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VOL. XLVIII.] JANUARY, 1925. [PART I.

NOTES OF RECENT CASES.

Odgers, J.
1st December, 1924. } *C. R. P. No.* 748 *of* 1924.

Civil Procedure Code C. 6 *R.* 17—*Suit for partition—Increase of share pending suit—Incidental attack of will—Amendment—Proper remedy.*

Pending a suit for partition by a Hindu son against his father and brother, the father died and the plaintiff applied to amend the plaint by claiming ½ instead of ⅓. In claiming the extra share, he also claimed to impugn a will alleged to have been executed by the father on the ground of undue influence etc. *Held* his proper remedy was not by way of amendment but by separate suit. 45 M. L. J. 811 followed.

Y. Suryanarayana for Petitioner.

C. V. Subramania Iyer for S. Subramania Sastry for Respondent.

T. S. V.

Phillips and Odgers, JJ.
4th December, 1924. } *A. S. No.* 138 *of* 1922.

Shipping—Charter party—Advance freight paid—Suit for refund—Vessel not ready to receive cargo—Effect.

A person paid advance freight for a vessel which he chartered for the carriage of goods during a particular period. The vessel was not ready to receive the goods at the stipulated period as it had been stranded on account of a storm and could be salvaged only later and the charterer sued to recover the advance paid. The charterparty provided that advance freight was to be paid only on the acceptance of the charter. *Held* the amount could be recovered, as the only event when it could

not be recovered was when the vessel had begun the voyage and sunk in the middle.

K. V. Krishnaswamy Aiyar and N. S. Rangasami Aiyangar for Appellant.

P. Somasundaram for Respondents.

T. S. V.

Wallace and Madhavan Nair, JJ.
5th December, 1924.

C. R. P. No. 205 of 1923.

Arbitration—Dissolution of partnership—Sale of Stock—Rights against strangers—Damages—If can award—Decision of points outside reference—Court enforcing award—Functions of.

In a suit for dissolution of a partnership, arbitrators were appointed to wind up the businers and sell the stock in trade. They held an auction sale and under the terms of the auction. the highest bidder was to deposit Rs. 1000 and on default to be liable for all losses on resale. A stranger bid for a sum of Rs. 28000, but as he did not pay the deposit, a resale was ordered. During the resale another person bid for Rs. 22,000 but as he too did not deposit the required amount, a further sale was held which resulted in a bid of Rs. 14000. The arbitrators mulcted the first bidder with the difference between his bid and the amount actually realised. *Held* (1) the arbitrators were bound by their own rules of sale and could not act outside the same; (2) they could not enforce in the arbitration proceedings any deficit that may have resulted in the re-sale, but should proceed by way of separate suit; (3) the right to award damages not having been included in the order of reference, decisions outside the scope of the reference were not binding on the parties thereto.

When an award is sought to be filed in court and made into a decree of court, the Judge disposing of the application is not constituted an appellate court over the arbitrators but has to decide the matter strictly in accordance with the provisions of the Civil Procedure Code.

T. R. Ramchandra Aiyar and K. Bhashyam Aiyangar for Petitioners.

S. Varadachariar and K. V. Krishnaswamy Aiyar for Respondents.

T. S. V.

Wallace and Madhavan Nair, JJ.
5th December, 1924.
C. R. P. No. 413 *of* 1924.

Madras District Municipalities Act (*V of* 1920), *Ss.* 93, 95—*Profession tax—Residence—Carrying on money-lending through an agent—Income in respect of land outside municipal limits.*

Profession tax can be levied in respect of income received within the municipality though the income might be in respect of lands situate outside the municipal limits.

Where a money-lender residing outside the municipality carries on his business through an agent who resides within and collects moneys due to his principal he cannot be made liable for profession tax in respect thereof.

T. L. Venkatrama Aiyar for Petitioner.

K. V. Krishnaswami Aiyar for Respondent.

T. S. V.

Odgers, J.
5th December, 1924.
C. R. P. No. 165 *of* 1924.

Madras Civil Rules of Practice, R. 287—*Adjournment—Reasonable fee to opposite side—Limit of.*

An adjournment of a suit was asked for by a party in a Subordinate Judge's Court on the ground his vakil had not come and the Court granted the same, but awarded the opposite side Rs. 80 as day's costs. *Held,* under R. 287 of Civil Rules of Practice, the Court had no power to award more than Rs. 10 which is the reasonable fee fixed therein.

M. Ramachandra Rao for Petitioner.

The Respondents not represented.

T. S. V.

Ramesam and Venkatasubba Rao, JJ.
8th December, 1924.
S. A. No. 247 *of* 1922.

Limitation Act, Art. 11—*Claim petition—Dismissal—Sale stayed at the instance of decree-holder—Subsequent sale—Suit by purchaser against claimant in possession—Conclusiveness of order—C. P. Code, O.* 21, *R.* 57—*Scope of.*

Property was attached in execution of a decree, and a claim petition which was put in was dismissed on the ground it was

presented too late. The decree-holder requested the Court to stop the sale and his execution petition was dismissed. The sale was subsequently held on an execution petition presented a day previous to the dismissal of the first execution petition. In a suit by the auction purchaser against the claimant in possession, *held* Art. 11, Limitation Act, did not apply and the claimant was not bound to sue to set aside the order rejecting the claim petition within one year; *held* also, the provisions of O. 21, R. 57 must be given due legal effect irrespective of the interests of parties. Judgment of Ramesam, J. in the order of reference in A. S. No. 36 of 1920 folld.; 40 M. L. J. 7 not folld.

T.M. Krishnaswami Aiyar for Appellant.

C. Krishnamachari for Respondent.

T. S. V.

Phillips and Krishnan, JJ.
10*th December*, 1924. } *A. S. No.* 100 *of* 1923.

Partnership—Suit for accounts—Bar of limitation—Right of partner to claim contribution from co-partner.

Where with respect to dealings arising out of a partnership, a suit for accounts had become barred, it is not open to one partner to call upon his co-partner to contribute towards one item of liability which had been discharged by him.

K. V. Krishnaswami Iyer and *A. Swaminatha Aiyar* for Appellant.

T. R. Ramachandra Iyer and *K. V. Sesha Aiyangar* for Respondent.

T. S. V.

The Chief Justice and Madhavan Nair, J.
11*th December*, 1924. } *O. S. A. No.* 63 *of* 1923.

Insolvency—High Court—Jurisdiction over mofussil Courts—Presidency Towns Insolvency Act, S. 18.

A Judge of the High Court sitting in insolvency is only part of the High Court and hence the Insolvency Court has powers of superintendence over the mofussil Courts in the Presidency.

S. Doraiswami Aiyar for Appellant.

Nugent Grant for Respondent.

T. S. V.

The Chief Justice and
Srinivasa Aiyangar, J.
15th December, 1924.

O. S. A. No. 97 *of* 1923.

Will—Construction—Bequest in favour of daughter and after her death to her children—Limitations on—Death of son during his mother's lifetime—Vested interest—Gift over—If takes effect.

A testator left a will by which he bequeathed a large sum of money after the lifetime of his daughter to such of her children as being sons shall attain the age of 21 or being daughters shall either marry or attain the age of 21. After making provision for the education and maintenance of such children, the testator bequeathed the residue of his estate to his son, with a gift over to him as follows :—"If my said daughter should die leaving no child living then so much of the said sum as has not become vested should go to my son." *Held,* a son of the testator's daughter who attained the age of 21 but died during the lifetime of his mother obtained a vested interest which was not divested by his not surviving her and hence the gift over to the son did not take effect. English cases on the point considered.

Nugent Grant and *Vere Mockett* instructed by *Messrs. Moresby and Taylor* for Appellant.

R. N. Aingar and *O. T. G. Nambiar* instructed by *Messrs. King and Partridge* for Respondent.

T. S. V.

Devadoss and
Wallace, JJ.
15th December, 1924.

R. C. No. 8 *of* 1923.

Civil Procedure Code, O. 38, *R.* 5—*Small Cause Court—Attachment before judgment—Immoveable property—Powers of.*

A Small Cause Court has power to attach immoveable properties before judgment under O. 38, R. 5, C. P. Code. 46 Cal. 717 ; 49 Cal. 994 folld. ; 6 M. H. C. R. 91 not folld. ; 26 Mad. 504 refd. to.

The Government Pleader appeared *amicus curiae.*

T. S. V.

Ramesam and Venkatasubba Rao, JJ.
15th December, 1924.

S. A. No. 1555 *of* 1922.

Hindu Law—Succession—Bandhus—Mother's sister's son—Mother's brother's son—Who is preferential heir.

As between a mother's brother's son and mother's sister's son, the former is the preferential heir under the Mitakshara school. Texts and case-law fully discussed. 33 Mad. 439 held overruled by the decision of the Privy Council in 44 Mad. 753.

B. Somayya for Appellants.

N. Chandrasekhara Aiyar for Respondents.

T. S. V.

The Chief Justice, Spencer, Kumaraswami Sastri, Beasley and Srinivasa Aiyangar, JJ. 17th December, 1924. — *Cr. Rev. Case No.* 392 *of* 1924.

Criminal Procedure Code, S. 195—*Amendment—Effect—Sanction given before new Act came into force—Power of District Magistrate to revoke—Revision.*

In cases of sanctions to prosecute given under S. 195, Cr. P. Code, before 1st September, 1923, when the new Code of Criminal Procedure came into force the person against whom such sanction has been granted has a substantive right to get it revoked by a superior authority and such rights are not affected by the coming into force of the new Act. If in the exercise of such right the District Magistrate revokes the sanction after 1st September, 1923, he cannot be said to have acted without jurisdiction. 47 Mad. 384; 19 L. W. 463 refd. to.

S. T. Srinivasagopalachari for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

The Chief Justice and Srinivasa Aiyangar, J. 19th December, 1924. — *Cr. M. P. No.* 735 *of* 1924.

Criminal Procedure Code, S. 497 (1) *and* (5)—*High Court—Powers of—Revocation of bail granted.*

Where a Judge of the High Court directs the release of certain accused persons on bail, the High Court has power, under proper circumstances, to revoke the order granting bail.

Circumstances to be considered by Courts in granting bail discussed.

K. S. Krishnaswami Aiyangar for Accused.

The Public Prosecutor for the Crown.

T. S. V.

Odgers and Wallace, JJ.
18th December, 1924. } *C. M. S. A. No.* 89 *of* 1923.

Limitation Act, Art. 181—*Decree modified in appeal—Prior realisation of amount in execution—Application for refund—Grant of—Subsequent execution application—Limitation.*

A person obtained a decree against a Hindu widow for the debt of her husband and attached a Zemindari property. To save the property from sale she paid off the full decree amount and the execution petition was dismissed. During the pendency of the execution proceedings she had preferred an appeal to the High Court and after the decree had been paid off the High Court decided that the decree should be against all properties in her hand "excluding the Zemindari property". Thereupon the widow applied for refund of the amount paid to the decree-holder and on 1—11—18 the amount was actually paid to her. The decree-holder then applied on 22—4—1920 to execute the decree and the judgment-debtor pleaded limitation, as it was more than 3 years from the date of the High Court decree. *Held* Art. 181 applied and the decree became executable only on 1—11—1918 when the money received was refunded. 26 Mad. 270; 30 Mad. 209; 40 M. L. J. 1, folld.; 7 Mad. 595; 7 Bom. 293, distd.; 45 Mad. 531; 21 C.W.N. 571; 22 C. W. N. 540; 47 I. C. 911; 74 I. C. 1014; 17 Cal. 268; 23 Cal. 437; 4 Pat. L. J. 230 referred to.

K. Bhashyam Aiyangar and *V. C. Viraraghavan* for Appellant.

A. Ramachandra Aiyar for Respondent.

T. S. V.

Phillips and Odgers, JJ.
19th December, 1924. } *A. S. No.* 382 *of* 1923.

Land Acquisition Act—Right to compensation—Attaching creditor—If a person interested—Rateable distribution—Compensation money if assets within S. 73, Civil Procedure Code.

Where pending the attachment of properties in execution of a decree, the same are compulsorily acquired by the Government, the attaching creditor is a person "interested" in the compensation amount within the meaning of the Land Acquisition Act and can apply for rateable distribution of the moneys

deposited with the District Judge for apportionment. Such moneys amount to "assets realized" within the meaning of S. 73, Civil Procedure Code.

Where the persons claiming rateable distribution are the attaching creditor, a subsequent mortgagee and subsequent creditors who had obtained decrees, even the latter can claim rateable distribution provided their applications were put in before the compensation amount was deposited with the District Judge. 33 I. C. 492; 69 I. C. 718, folld.; 62 I. C. 857 dissented from.

G. Lakshmanna for Appellant.

P. Chenchiah, C. Rama Rao and *K. Ramamurthi* for Respondents.

T. S. V.

Srinivasa Aiyangar, J.
19th December, 1924. } *Cr. Rev. Case No.* 368 *of* 1924.

Criminal Procedure Code, S. 148—*Order as to costs—Order passed six months later than the possessory order—If valid.*

An order as to costs, passed by a Magistrate in a proceeding under S. 145, Criminal Procedure Code, more than six months after the date of the possessory order is *ultra vires* and liable to be vacated. An order as to costs must be simultaneous with the passing of the decision under S. 145, Criminal Procedure Code, or at last, soon after, so as to be considered as part of the same proceedings.

T. K. Srinivasa Tatachari for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Phillips and Krishnan, JJ.
7th January, 1925. } *A. S. No.* 64 *of* 1922.

Negotiable Instruments Act, S. 45—*Contract for purchase of yarn—Advance paid per hundi—Failure to deliver part of yarn—Suit on hundi—Defence of failure of consideration—If open—Amount if ascertainable without collateral inquiry.*

A person entered into a contract to sell certain bales of yarn as and when manufactured by the Madura Mills, and the vendee gave a hundi in advance at a certain rate per bale of

yarn. Some bales were not delivered. The vendor instituted a suit on the hundi, whereupon the vendee pleaded partial failure of consideration basing it on the non-delivery of a certain number of bales. *Held per Krishnan, J.* (*Phillips, J.* not expressing any opinion on the point) the plea can be set up in defence and gone into by Court as the consideration which is alleged to have failed is "ascertainable in money without collateral inquiry" within the meaning of S. 45, Negotiable Instruments Act. L.R. 2 Exch. Cases 56 referred to.

K. V. Krishnaswami Aiyar, K. Rajah Aiyar and *N. Swaminatha Aiyar* for Appellant.

A. Krishnaswami Aiyar and *P. S. Chandrasekhara Aiyar* for Respondents.

T. S. V.

Devadoss and Wallace, JJ.
7th January, 1925.

C. M. A. No. 232 *of* 1924.

Provincial Insolvency Act (*V of* 1920), *Ss.* 28 (6) *and* 53—*—Insolvency—Suit by mortgagee in Court of Subordinate Judge—Application by Official Receiver to annul mortgage—Stay of suit—Powers of Court—Provincial and Presidency Towns Acts compared.*

Pending proceedings in insolvency in a District Court, a mortgagee of the insolvent filed a suit on his mortgage in a Subordinate Judge's Court. The Official Receiver instituted proceedings under S. 53 of the Provincial Insolvency Act to have the mortgage avoided as a fraudulent preference and applied to the Court to stay proceedings in the Subordinate Judge's Court. *Held,* the Insolvency Court was not a Court of exclusive jurisdiction and hence the pendency of proceedings under S. 53 did not take away the jurisdiction of a Subordinate Judge to entertain a suit the right to file which was preserved to the mortgagee under S. 28 (6). But the Insolvency Court has no power to stay proceedings in the Sub-Court in the absence of provisions in the Provincial Act analogous to S. 18 of the Presidency Towns Insolvency Act. The proper remedy would be to apply to the Subordinate Judge to stay the suit on his file. As the decision of the Insolvency Court in the proceedings

under S. 53 would be binding on all parties, it would be a fit and proper case to stay the mortgage suit.

A. C. Sampath Aiyangar for Appellant.

T. M. Krishnaswami Aiyar for Respondent.

T S. V.

Wallace and Madhavan Nair, JJ.
7th January, 1925. } C. R. P. No. 526 *of* 1924.

Madras District Municipalities Act (V of 1920)*—Rules for the conduct of elections—Vice-Chairman a candidate—If an officer—Disqualification—Violation of rules—Effect of—Misinterpretation of rule—If ground for interference in revision.*

The violation of Election Rules does not *ipso facto* render an election void, and the jurisdiction of a Civil Court to set aside an election on the ground of any rule having been violated exists only if such violation has materially affected the result of the election. 46 Mad. 123 folld.

The correctness of the interpretation by a Court of law of one of the rules framed for the conduct of elections cannot be questioned in revision.

The Vice-Chairman of a Municipality is not debarred from standing as a candidate for a Municipal ward election as he is not an " officer " within the meaning of the term as used in the Act.

T. R. Ramachandra Aiyar and *S. S. Ramachandra Aiyar* for Petitioner.

T. M. Krishnaswami Aiyar, N. Sivaramakrishnier and *K. Periasami Gounden* for Respondents.

T. S. V.

Phillips and Krishnan, JJ.
11th December, 1924. } *C. M. P. Nos.* 99 *and* 100 *of* 1924.

Civil Procedure Code, O. 41, *Rr.* 4 *and* 33—*Appeal by two persons—Death of one of them—Appeal allowed afterwards without the legal representatives of the deceased appellant brought on record—Whether decree in appeal nullity—Review application by respondent with the legal representatives on record—Effect of.*

An appeal preferred by two members of a joint Hindu family against a decree dismissing the plaintiff's suit on a mortgage executed by the defendants in favour of the plaintiff was heard 7 days after the death of one of the appellants which was not known to the vakils who appeared in the case or brought to the notice of the Court; and the appeal was allowed with the result that the plaintiff's suit was decreed *in toto*. Subsequently one of the defeated respondents filed an application for review making the legal representatives of the deceased appellant parties to the petition and filed a separate application for bringing on record the legal representatives of the deceased appellant within the period of limitation. It was contended by the respondent in an application to pass a final decree in pursuance of the preliminary decree, that the whole decree was a nullity, as it was passed in favour of a dead man and that the suit had abated.

Held, (1) that there could not be any question of abatement, as the appeal was on grounds common to all the appellants, and a decree could be passed even in favour of the other appellant under O. 41, Rr. 4 and 33, that the deceased appellant was not on a worse footing than one who had not appealed at all. 27 Bom. 284 followed. 33 Mad. 137 and 22 M. L. J. 169 referred to ;

(2) that the application filed by one of the respondents for bringing on record the legal representatives of the deceased appellant and the review application enured for the benefit of the appellant. 45 Cal. 94 (P. C.) referred to ;

(3) that even if there is any abatement the delay could be excused in the circumstances of the case.

P. Somasundaram and *P. Satyanarayana* for Petitioners.

B. Jagannadha Doss and *N. Swaminatha Aiyar* for Respondents.

C. A. S.

N R C

Devadoss and Wallace, JJ.
12th December, 1924. } *C. M. A. No.* 117 *of* 1924.

Civil Procedure Code, O. 1, *R.* 10—*Transposition of parties —Prejudice to other parties—Transposition at a late stage not allowed.*

In a suit primarily in ejectment with an alternative prayer for partition between the plaintiff and the defendants, it is not open to such of the defendants as have confessed judgment prior to trial to apply at a later stage for tranposition as plaintiff under O. 1, R. 10 of the Civil Procedure Code to the prejudice of the other and contesting defendants in the action.

Ch. Raghava Rao for Appellant.

Y. Suryanarayana for Respondent.

C. A. S.

Spencer and Odgers, JJ.
19th December, 1924. } *A. S. No.* 420 *of* 1922.

Minor—Adoption into another family—Suit by natural father as next friend to set aside gift deed by adoptive father—Compromise of suit by natural father—Binding nature of compromise on the minor—Fraud and gross negligence of guardian ad litem *in the conduct of the suit—Guardian not setting up fraud in registration law in the suit, effect of.*

A minor on attaining majority, instituted a suit to set aside a gift deed executed by his alleged adoptive father in favour of his wife on the ground that he was given adoption on the 21st day after his birth by his natural father, and that the ceremonies of adoption took place subsequently, that the gift deed is not binding, as it was executed subsequent to his adoption. The gift deed was also impeached on the ground that it was brought about by force, fraud and undue influence. In a prior suit instituted by the minor through his natural father as next friend against the widow the minor's natural father compromised the suit by getting two acres out of the properties gifted to the widow, as he could not establish the factum of his adoption on the 21st day of his birth, *i. e.*, prior to the execution of the gift deed, and the Court sanctioned the compromise as beneficial to the minor and a compromise decree was passed.

The compromise decree was impeached on two grounds (*i*) that the natural father of a minor after adoption cannot represent him in any proceeding as he is not his guardian; (*ii*) that the guardian was grossly negligent in the conduct of the prior suit in that he did not plead a valid defence, namely, that the gift deed was invalid, as being a fraud upon registration law in that two cents were included in the deed which minor alleged belonged to the executant, to get it registered in another place. 41 Cal. 972 (P. C.) and 48 Cal. 509 (P. C.).

Held, (1) that the natural father could represent his son, adopted into another family, when there was no other guardian or the adoptive mother was hostile to the interests of the adopted son. 9 Bom. 365 and 43 Mad. 288 cited and followed.

(2) The guardian of a minor is not bound to contest all suits on behalf of a minor, and he can compromise all doubtful and untenable claims. 14 M. I. A. 393 and 6 C. L. J. 488 at p. 452 referred to.

(3) It is not gross negligence on the part of a guardian *ad litem* if he does not set up a false or frivolous defence, as, for instance, fraud on registration law, when the other party was not a party to the fraud. The law before 41 Cal. 972 (P. C.) was quite the other way, namely that registration was valid. The compromise decree cannot be set aside on the simple ground that the guardian did not set up that plea. 24 M. L. J. 664; 41 All. 22; 48 Cal. 509 at 516, 517; 46 Mad. 435 cited and distinguished. 46 M. L. J. 12: (1924) M. W. N. 124 approved. 45 Mad. 425 distinguished.

C. Rama Rao for Appellant.

P. Somasundaram and *P. Satyanarayana* for Respondents.

C. A. S.

Devadoss and Wallace, JJ.
8*th January*, 1925.

C. M. A. No. 413 *of* 1923.

Civil Procedure Code, S. 48—*Decree for costs against trustee personally —Provision to realise it from trust estate in default—Death of trustee—Execution application against estate more than* 12 *years after decree but within* 12 *years of death—If barred.*

A decree for costs was passed against a trustee personally, but it further provided that in case it could not be recovered

from him the trust property would become liable. After a part of the decree had been realised from the trustee, he died, whereupon the new trustee was impleaded in execution proceedings. Subsequently an application was put in to realise the balance more than 12 years from the date of the decree but within 12 years of the death of the original decree-holder. The new trustee pleaded that the decree was barred under S. 48, C.P. Code. *Held per Devadoss, J.* (*Wallace, J.* dissenting) the decree was barred and the decision in 40 Mad. 989 (F. B.) must be deemed to have been overruled by the decision of the Privy Council in 22 C. W. N. 145.

Per Wallace, J.—In such a case the period of 12 years under S. 48 does not run from the date of the decree. The original decree contemplates a further order of Court that the decree amount could not be realised from the trustee personally and it was only thereafter that the balance remaining unpaid could be sought to be recovered from the trust property.

On account of this difference in opinion their Lordships referred the case to a third Judge under S. 98, C. P. Code.

L. S. Viraraghava Aiyar for Appellant.

K. V. Krishnaswami Aiyar and *N. Swaminatha Aiyar* for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ.
8th January, 1925. } *C. M. A. No.* 435 *of* 1923.

Civil Procedure Code, O. 23, R. 3—Compromise of three different suits—Decree only in one suit—Validity of—Compromise if enforceable.

There were three different suits pending between the same parties, one for specific performance, or for recovery of money in the alternative, another on a promissory note and a third on a mortgage deed. All the three suits were compromised, and it was agreed that the defendants should pay a certain sum of money to plaintiffs and, on default, their lands were made liable. This compromise was filed in the first suit, and the other suits were withdrawn pursuant to the compromise. As the defendants made default in payment, execution was taken out against the lands, and objection was then taken that the decree was not

executable in so far as it did not relate to the particular suit, that at any rate it could not be valid for more than the amount claimed in the plaint therein, and that a separate suit ought to be brought to enforce the compromise. *Held,* that the compromise was valid, that the reliefs embodied in the compromise need not be confined to the reliefs claimed in that plaint, that the withdrawal of the other suits was a consideration for the compromise, and that it was executable. 38 M. 959 ; 30 M. 421 ; 30 M. 478 followed.

S. Muthia Mudaliar and *A. V. Viswanatha Sastri* for Appellant.

C. V. Ananthakrishna Aiyar and *K. P. Ramakrishna Aiyar* for Respondent.

T. S. V.

Wallace, J.
9th January, 1925. } *S. A. No.* 402 *of* 1922.

Promissory note—Letter of agreement—Undertaking to take assignment and pay on default—If a guarantee—Suit on—Remedy—Joinder of causes of action.

Along with a pro-note executed to plaintiff by 1st defendant, the 2nd deft. executed a letter of even date undertaking that in default of payment within three months by the executant of the pro-note, he would pay over the amount and take an assignment of the promissory note. The plaintiff filed a suit on the promissory note about the last day of limitation against both the defendants, but did not offer in the plaint to assign the pro-note to second deft. *Held,* though the second defendant was liable for the breach, plaintiff could not recover as against him in the suit on the pro-note but should proceed against him in an action for breach of the contract contained in the letter. The two causes of action could not be joined in one suit.

C. V. Ananthakrishna Aiyar for Appellant.

T. R. Ramachandra Aiyar and *T. D. Srinivasachari* for Respondent.

T. S. V.

Phillips and Krishnan, JJ.
14th January, 1925. } *A. S. No.* 43 *of* 1921.

Civil Procedure Code, S. 92—Suit for removal of Pandarasannadhi and for framing scheme—Death of defendant—Effect of—Abatement—Decision in interlocutory Receiver application—

Res judicata—*Madras Religious Endowments Act—Effect on pending scheme suit.*

Pending a suit under S. 92, C. P. Code, for removing the *Pandarasannadhi* of a mutt from his office and for framing a scheme for the management thereof, he died. *Held*, the removal of the defendant from his position and the framing of the scheme are distinct reliefs and there is no abatement of the suit so far as the prayer for a scheme is concerned. 48 Cal. 493 (P. C.) and 28 M. L. J. 174 folld.

Where in disposing of an interlocutory Receiver application in the appeal, a Bench of the High Court gave its own opinion as to whether the suit had abated or not, it does not operate as *res judicata*. 48 Cal. 449; 47 M.L.J. 286 explained.

The new Madras Religious Endowments Act has no effect on pending scheme suits.

S. Srinivasa Aiyangar, S. Muthia Mudaliar, A. C. Shanmuga Nainar and *S. V. Narayana Aiyar* for Appellants.

T. Rangachariar and *V. N. Venkatavaradachariar* for Respondents.

T. S. V.

Chief Justice and
Madhavan Nair, J.
14th January, 1925.

R. T. No. 94 *of* 1924.

Criminal Procedure Code, S. 342*—Statements by accused —Warning to be given to Court—English Law and Indian Law —Suggestion to legislature.*

In every case where in the course of complying with the provisions of S. 342, Cr. P. Code, statements made by the accused are recorded, it is the duty of the Court to give express warning to the accused that he is not bound to make any statement and that his statements are likely to be used against him. The general form of warning to be used discussed.

Their Lordships also point out the propriety of amending the Code in such a way as to make the Indian Law conform to the English principle, *i. e.*, that in Sessions cases such statements made before the Magistrate need not necessarily in all cases be put in evidence before the jury. 11 and 12 Vict. Ch. 42, S. 18; 39 Mad. 770 and 46 Mad. 449 (F. B.) refd. to.

C. Sambasiva Rao for Accused.

The Public Prosecutor for the Crown.

T. S. V.

Odgers, J.
14th January, 1925. } *S. A. No.* 1040 *of* 1922.

Civil Procedure Code, S. 100—*Village Munsiff—Removal of property for arrears—Payment of arrears—Wrongful detention—Suit for damages—Nature of—Second appeal—If lies.*

A suit for damages for wrongful detention of property originally removed by a Village Munsiff for arrears due, even after such arrears were paid is a suit of a small cause nature and when the amount or value of the subject-matter is less than Rs. 500, no second appeal lies. 22 Mad. 457 folld.

B. Satyanarayana for Appellant.

V. Suryanarayana for Respondent.

T. S. V.

Devadoss and Wallace, JJ.
15th January, 1925. } *C. M. S. A. No.* 104 *of* 1922.

Execution sale—Purchase—Decree subsequently set aside—Effect on purchase—Party to suit—Position of—Principle of restitution.

Where the purchaser at an execution sale is a party to the suit, either as plaintiff or as defendant, whether there was a decree in his favour or not, and whether he himself applied for sale or not, the sale in his favour must fall to the ground on the reversal of the decree under which the sale took place. The principle of the decision of the Judicial Committee in 10 All. 166 applies to all cases where the purchaser is not a stranger to the suit.

A subsequent mortgagee who had been impleaded as a defendant but who had no decree passed in his favour purchased the suit properties in execution of an *ex parte* decree obtained by the plaintiff. The decree was subsequently reversed. *Held*, the sale must be set aside, as the general principle of restitution applies. 20 C. L. J. 469 folld.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *N. Ramachandra Aiyar* for Respondent.

T. S. V.

Ramesam and Venkatasubba Rao, JJ.
16th January, 1925. } *S. A. No.* 1521 *of* 1922.

Chit fund—Amounts paid in monthly instalments—Prizes at the end of each month drawn by lots—Repayment of whole amount

paid to unsuccesful chitholders after the expiry of term—If a lottery—Penal Code, S. 249A.

Under the terms of a chit fund, there were to be 500 subscribers paying one rupee per month. At the end of each month, a prize was to be drawn by lot and the successful subscriber was to get Rs. 50 and thereupon his connection with the chit was to cease. After the expiry of 49 such prize drawings, all the remaining unsuccessful subscribers were to be paid at the end of the 50th month Rs. 50 each and the chit was to close. *Held,* on an exhaustive survey of English and Indian case-law, the arrangement was not a lottery or punishable under S. 294A of the Penal Code, and rights accruing in respect of the same can be made the subject of a civil suit. (1858) S. D. A. 54; 1 M. H. C. R. 448; 22 Mad. 212; (1880) 5 A. C. 685 folld.; (1919) M. W. N. 570; 47 M. L. J. 876 dissented from; 11 Q. B. 207; (1893) 2 Ch. 154; (1907) 1 K. B. 448; 10 Cox Cr. Cases 352 distd.; 23 All. 165; 25 All. 639; 14 M. L. J. 326 referred to.

V. C. Seshachariar and *K. V. Sesha Aiyangar* for Appellant.

P. Somasundaram and *K. S. Desikan* for Respondent.

T. S. V.

Kumaraswami Sastri, J.
16th January, 1925. } *C. S. No.* 615 *of* 1919.

Hindu Law—Maintenance—Sudras—Illegitimate children—Charge on properties—Sons and daughters—Rights of—Difference.

Under the Hindu Law, an illegitimate son of a Sudra is entitled to maintenance throughout his life which can be charged on joint family properties in the hands of the putative father and other members of the family ; so far as illegitimate daughters are concerned, they must be treated as members of the family of the putative father and are entitled to maintenance until they marry or attain majority. Case-law discussed.

Nugent Grant, Sidney Smith and *K. S. Krishnaswami Aiyangar* for Plaintiffs.

V. Radhakrishnayya and *S. Rangaswami Aiyangar* for Defendants.

T. S. V.

Ramesam and Wallace, JJ. }
14th January, 1925. } *C. M. P. No.* 1012 *of* 1924.

Civil Procedure Code, O. 45, *R.* 7 *as amended by Act XXVI of* 1920—*Time for furnishing security—Power of Court to extend—Leave to appeal granted under cl.* 39, *Letters Patent—Insolvency—Judicial Committee Rules, R.* 9.

Where in a matter arising in insolvency, the High Court grants leave to appeal to His Majesty in Council under cl. 39 of the Letters Patent, under O. 9 of the Judicial Committee Rules which applies, the High Court can grant an extension of time to furnish security for costs. In such a case the matter is not governed by O. 45, R. 7 as amended by Act XXVI of 1920. 18 L. W. 29 distinguished.

The Advocate-General and *L. S. Viraraghava Aiyar* for Appellant.

G. Krishnaswami Aiyar for Respondent.

T. S. V.

The Chief Justice and Krishnan, J. }
19th January, 1925. } *O. S. A. No.* 118 *of* 1923.

Limitation Act, Arts. 62, 96—*Sale of goods—Short delivery—Suit for price—Limitation when commences—Equitable restitution—Doctrine—Applicability.*

The defendants sold to the plaintiffs some bales of grey shirtings for cash on delivery. The goods passed hands a number of times and the ultimate purchaser complained to the plaintiffs that some of the bales did not contain the stipulated number of pieces, whereupon the plaintiffs sued the defendants for their price. *Held* (1) the claim being one based on short delivery due to mistake, Art. 96 and not Art. 62 governed the case and time began to run from the date of discovery of the mistake; (2) the fact that the defendants themselves purchased the goods from others from whom they could not recover compensation for the shortage was no defence to the plaintiffs' suit; and (3) the doctrine of equitable restitution applied to the cases of principal and agent only and not to the present case. 43 M. L. J. 142 distd.; 6 C. P. 405; (1913) 1 Ch. 127 folld.

V. Radhakrishnayya and *A. V. Seshayya* for Appellants.

T. D. Srinivasachari and *T. Chakravarthi Aiyangar* for Respondents.

T. S. V.

N R C

Phillips and Krishnan, JJ.
20th January, 1925.
A. S. No. 192 *of* 1923.

Limitation Act, S. 10—*Scope of—Purpose to be specific—Control of person over property if sufficient.*

Under S. 10, Limitation Act, all that is required is that the purpose of the trust should be specific. Property will be deemed to be vested in a person as trustee for the purposes of the section if he has control over the property. Observations of *Schwabe, C.J.* in 44 M.L.J. 431 folld. by *Phillips, J.* (*Krishnan, J.* holding *contra*). Case-law under the section considered.

A. Krishnaswami Aiyar for Appellant.

T. M. Krishnaswami Aiyar for Respondent.

T. S. V.

Phillips, J.
20th January, 1925.
S. A. No. 1469 *of* 1922.

Inam—Karnam service inam—Agreement to sell prior to enfranchisement—Conveyance to be executed after—If valid:

A contract to sell Karnam service lands entered into prior to enfranchisement, even though the conveyance was to be executed only after the enfranchisement is invalid. 39 Mad. 544 and 50 I. A. 239 folld.

B. Satyanarayana for Appellants.

Y. Suryanarayana for Respondents.

T. S. V.

Phillips, J.
21st January, 1925.
S. A. No. 922 *of* 1923.

Railway—Risk Notes A and B—Consignment of goods—Invoices mislaid—Delay in delivery of goods—Fall in market—Loss—Liability for.

Bags of rice were sent from Calcutta to Calicut. During the railway transit, the axles of the waggon containing the bags became hot and consequently change of waggon was necessary. Finally the goods reached Calicut but as a result of the Company mislaying the invoices the consignee could not take delivery of the bags for some time. When he actually took delivery the

market had fallen. He sued the Company for the loss. *Held,* the fall in the market was deterioration within the meaning of the Risk Notes and hence the Company was not liable. The rule laid down in *Hadley* v. *Baxendale,* 9 Ex. 341, would apply in the absence of a contract to deliver goods on a particular date in order to meet a particular condition of the market. 30 L. J. (C. P.) 232; (1922) 1 A. C. 178 refd. to.

N. Panchanatha Aiyar for *V. Viswanatha Sastry* for Appellant.

K. Sundara Rao for Respondent.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ. *21st January,* 1925. — *C. M. A. No.* 93 *of* 1922.

Civil Procedure Code, S. 144—*Restitution—Attachment of property in execution—Claim not allowed—Sale set aside under O.* 21, *R.* 89—*Private sale—Loss incurred—Claim allowed in appeal—Damages, if claimable.*

In execution of a decree against the assets of R, one of the defendants preferred a claim which was disallowed and the property was sold and purchased in Court auction by the decree-holder. The claimant preferred an appeal but as he did not get stay, he had the sale set aside under O. 21, R. 89 by depositing the decretal amount after effecting a private sale of the property. In appeal, the claimant succeeded, and thereafter applied under S. 144, for restitution and damages; he claimed damages for wrongful attachment and for the loss incurred by the private sale, and for loss of interest on the money deposited.

Held, the damages for the loss incurred as a result of the private sale were too remote; that he could not claim interest as damages as he need not have deposited at all; and damages for wrongful attachment must be claimed in a separate suit, and not in execution.

C. Venkatasubbaramiah and *K. P. Ramakrishna Aiyar* for Appellant.

C. S. Venkatachariar for Respondent.

T. S. V.

The Chief Justice and Krishnan, J.
21st January, 1925.

A. S. No. 168 *of* 1922.

Transfer of Property Act, S. 55 (4)—*Applicability—Premium fixed under lease—Promissory note—Suit on—Charge on property if can be claimed—Rules of English Law how far applicable—Estates Land Act, Ss.* 5 *and* 25.

Agraharamdars owning both *warams* in a village granted a permanent patta of the lands with occupancy rights. At the time of the grant, a certain amount of *nazarana* or premium was fixed but this was not paid at all. The grantees executed a promissory note in lieu of the same and then transferred their rights. The agraharamdars filed a suit on the promissory note against their grantees and their transferees and claimed as charge on the properties for the sums due under S. 55 (4), T.P. Act. *Held,* the lease created was not such a transfer of interest as amounted to a sale in land and hence the provisions of S. 55 (4) would not apply. 6 Ch. D. 597 distd. and the observations of *Wallis, C. J.* in 42 Mad. 203 held to be *obiter.*

Per Krishnan, J.—The lease was only the transfer of a fractional interest in immoveable property. The technical rules of English Law as to lessor and lessee and the way in which premia could be realised have no application to India, where the questions have to be decided under the Transfer of Property Act. The *nazarana* cannot be a charge, for under the Madras Estates Land Act while rent has been made a charge under S. 5, S. 25 expressly disallows such a legal incident to premia fixed.

K. Bhashyam Aiyangar for Appellant.

V. Ramadoss and *V. Krishna Mohan* for Respondent.

T. S. V.

Ramesam and Venkatasubba Rao, JJ.
21st January, 1925.

S. A. No. 1586 *of* 1922.

Ryotwari Settlement—Nature and incidents of—Land-tax if can be increased during period of Settlement—Suit for declaration of illegality and refund—If lies—Revenue Recovery Act, S. 58 *—Limitation—Period of notice to Secretary of State—If can be deducted in computing time.*

The Government cannot revise or enhance the land tax of ryotwari lands during the currency of the thirty years' period of Settlement contrary to the notifications issued introducing such settlement. Such notification is a definite undertaking and amounts to a grant in favour of the ryotwari holder. Features of ryotwari settlement discussed. 25 Mad. 457; 27 Mad. 386; 28 Mad. 80; 44 I. A. 166 referred to; 47 M. L. J. 780 folld.

S. 58 of the Madras Revenue Recovery Act forbids Civil Courts from considering questions relating to rate of revenue or amount of assessment. But a Civil Court can go into the question whether the land is liable to be assessed and can give effect to binding engagements as between pattadar and the Government.

In a suit for recovery of excess tax illegally levied by the Government, the period of 2 months' notice required to be given to the Secretary of State under S. 80, C. P. Code, can be deducted in computing the period of limitation. 38 Mad. 92.

C. V. Anantakrishna Aiyar for Appellant.

The Advocate-General for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ.
22nd January, 1925.

C. M. A. No. 435 *of* 1922.

Civil Procedure Code, O. 38—*Attachment before judgment—Interest of coparcener in joint family property--Death of judgment-debtor after decree—Effect—Right of survivorship if defeated—Charge—If created.*

Where the attachment before judgment of a coparcener's interest in joint family properties is followed by a decree against the debtor and his subsequent death, it operates as a bar to the rights of survivorship of the other members of the family. Such attachment does not, however, create a charge over the properties. 5 Cal. 148 (P. C.); 25 Cal. 178 (P. C.); 4 Mad. 302; 16 M. L. T. 123; 26 M. L. J. 517; 32 Mad. 429 referred to; 38 Bom. 105; 3 Pat. 250 dissented from.

S. T. Srinivasa Gopalachari for Appellant.

Messrs. Marthandam and *Chidambaram* for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ.
22nd January, 1925.
C. *M. A. No.* 433 *of* 1923.

Civil Procedure Code, S. 11—Res judicata—*Hindu widow—Finding in a suit before the District Munsiff of the genuineness of a will—Whether* res judicata *in a suit in the Sub-Court—Concurrent pecuniary jurisdiction, whether a test.*

A finding in favour of the genuineness of an alleged will of the last male holder arrived at in a suit in a Munsiff's Court brought by a legatee under the will to which the widow was a party and in which she admitted the genuineness of the will is not one binding on the reversioner in a subsequent suit in a Sub-Court.

The widow does not represent the estate in such a case within the meaning of the *Sivaganga case,* 9 M. I. A. 539 and it makes no difference even if the genuineness of the will was contested in the prior suit by the alienee from the widow. 40 All. 93 referred to.

The requirement as to concurrent pecuniary jurisdiction enacted by S. 11 of the Civil Procedure Code, assuming that such a requirement does not exist in English Law, nevertheless applies to cases of decrees to which Hindu widows are parties, even though S. 11 does not strictly and in terms govern such cases. 2 Smith's Leading Cases 754 referred to.

Ch. Raghava Rao for Appellant.

S. Varadachariar, A. Sundaram Aiyar and *V. Suryanarayana* for Respondents.

C. A. S.

Phillips, J.
23rd January, 1925.
S. A. No. 1441 *of* 1922.

Civil Procedure Code, Ss. 11 *and* 47—*Parties—Official Assignee—If a representative of judgment-debtor—Small Cause suit—Order on claim petition—Execution on Original Side of Court—If bars subsequent suit for declaration and injunction.*

The Official Assignee is not the representative of a judgment-debtor for the purpoee of S. 47, C. P. Code, or for the

purposes of *res judicata.* 7 All. 752; 30 All. 486; 29 Cal. 428 followed; 28 Cal. 419 dissented from.

An order on a claim petition passed under S. 47, C. P. Code, while a decree in a Small Cause suit is being executed under the Original Side jurisdiction of a Court cannot bar a subsequent suit for a declaration and injunction by the defeated claimant with respect to the same properties.

N. Srinivasa Aiyangar for *K. S. Krishnaswami Aiyangar* for Appellant.

T. R. Ramachandra Aiyar and *V. Subramania Aiyar* for Respondents.

T. S. V.

Devadoss and Wallace, JJ.
26th January, 1925.

C. M. S. A. No. 65 *of* 1923.

Presidency Small Cause Courts Act, Ss. 31 *and* 38 *and R.* 42 *of Madras Rules—Civil Procedure Code, Ss.* 8, 24, 42 *and* 47—*Decree of Presidency Small Cause Court—Transfer to mofussil Court for execution—Claim order under S.* 47—*If appealable—Estoppel by pleadings.*

A decree of the Presidency Small Cause Court passed against the assets of one A was transferred to a Munsiff's Court for execution, and the plaintiff had some immoveable property attached as belonging to A, when the defendants preferred a claim under S. 47, C. P. C., alleging that the properties were joint family properties over which A had no disposing power and that they had devolved on the defendants by survivorship. The Munsiff upheld their claim but the District Judge in appeal reversed it on the ground of estoppel as the defendants had pleaded in the Small Cause Court that they were not joint with A. A question being raised that no appeal lay to the Distric Judge, *held,* that the decree of the Presidency Small Cause Court after transfer to the Munsiff's Court became a decree of the Munsiff passed on the original side and that by virtue of S. 31 of Presidency Small Cause Courts Act, the procedure of C. P. C. becomes applicable. S. 38 does not apply nor does R. 42 of the Presidency Small Cause Court rules and hence an appeal lay. The defendants were also held to be estopped by virtue of their plea in the Small Cause Court.

K. P. Ramakrishna Aiyar for *S. Krishnamachariar* and *N. R. Sesha Aiyar* for Appellant.

S. G. Satagopa Mudaliar for Respondent.

T. S. V.

Devadoss and Wallace, JJ.
26th January, 1925 } *C. R. P. No.* 547 *of* 1924.

Madras Civil Rules of Practice, R. 277—Application by plaintiff to restrain pleaders from appearing for defendants—Scope of rule—Jurisdiction of Court to restrain.

The plaintiff in a suit applied to restrain certain pleaders from appearing for the defendant on the ground that they had appeared for him in connected suits on former occasions. The Court below held the suits were connected within the meaning of R. 277 of the Civil Rules of Practice and granted the plaintiff's prayer. In revision it was contended that the pleaders not being parties to the petition, the lower Court had no jurisdiction to refuse audience. *Held,* even though the pleaders were not parties, the Court had jurisdiction to entertain such an application. O. 3, R. 4 considered.

The words "or in any other matter connected therewith" in R. 277 must be held to apply to subsequent proceedings which flow out from the former. 41 M. L. J. 60 ; 38 Mad. 650 referred to.

K. V. Krishnaswami Aiyar and *R. Kesava Aiyangar* for Petitioner.

T. M. Krishnaswami Aiyar and *K. G. Srinivasan* for Respondent.

T. S. V.

The Chief Justice and Krishnan, J.
28th January, 1925. — *A. S. No.* 44 *of* 1922.

Principal and agent—Suit for damages for fraudulent misrepresentation—Promissory note taken by agent—Void as against the Paper Currency Act—Right of action.

An agent who had taken an inadequate security from a debtor was seriously taken to task by his principal, whereupon he took a promissory note from the debtor. The pro-note was null and void as it was in contravention of the Paper Currency Act and was subsequently also declared to be a forgery. The principal sued the agent for damages for fraudulently misrepresenting that he had taken a valid promissory note. *Held,* he was not entitled to it as the promissory note itself was void and on the principle *ignorantia juris non excusat* the principal should be deemed to have known of the true state of affairs.

C. V. Anantakrishna Aiyar, P. S. Narayanaswami Aiyar and *P. S. Ramachandra Aiyar* for Appellant.

M. Patanjali Sastri and *A. C. Sampath Aiyangar* for Respondent.

T. S. V.

Madhavan Nair, J.
28th January, 1925. — *S. A. No.* 1349 *of* 1921.

Limitation Act, Art. 134—*Mutt—Trustee — Mortgage—Suit by mortgagee—Sale and purchase by stranger—Suit by new trustee for possession—Position of* bona fide *purchaser.*

The trustee of a mutt created a mortgage of certain mutt properties in 1886. The mortgagee sued on the mortgage, had the properties sold and they were purchased by a stranger. The trustee died in 1900 and after the removal of the next three trustees the succeeding trustee sued in 1916 for possession on the basis that the mortgage was not binding on the trust and as it had been executed by the trustee in his personal capacity, the proceedings which culminated in the sale were not binding on the mutt. The defendant auction purchaser pleaded limitation and also that the mutt was bound by the prior proceedings. *Held,* (1) the suit was not barred under Art. 134, as the Article did not apply. 48 M.L.J. 114 followed ; (2) when a person having a dual capacity executes a document, as against *bona fide* purchasers it must be deemed to have been executed

in his representative capacity also. 42 Cal. 56 (P.C.); (1916) 2 M. W. N. 115; 46 M. L. J. 314 followed; and (3) the mortgage being binding, subsequent proceedings also were binding. 35 M. L. J. 51 and 20 W. R. 86 followed.

K. Ramamurthi for Appellant.

V. Ramadoss for Respondent.

T. S. V.

Madhavan Nair, J.
30th January, 1925. } *C. M. S. A. No.* 65 *of* 1922.

Civil Procedure Code, O. 21, Rr. 71 and 66—Failure to deposit balance of purchase money—Resale—Loss—Suit for balance—Date, time and place of re-sale not given in sale proclamation—Effect of—Liability of first purchaser.

The purchaser at an auction sale failed to deposit the 75 per cent. of the purchase money in time. A re-sale took place which resulted in a loss. In a suit to recover the deficiency from the original purchaser he pleaded that the sale proclamation for the re-sale did not mention the date, time or place of the sale and as such the re-sale was wholly illegal. *Held,* the omission to give the particulars was only an irregularity and in the absence of proof of prejudice it would not affect the legality of the re-sale or the liability of the defendant for the deficiency. 16 Cal. 535; 44 Mad. 35; 36 Bom. 329 distinguished.

Chidambaram and Martandam for Appellant.

G. Thiruvenkatachariar for Respondent.

T. S. V.

Madhavan Nair, J.
30th January, 1925. } *C. R. P. No.* 646 *of* 1924.

Civil Procedure Code, O. 21, R. 58—Question to be decided —Failure to go into—Interference in revision—Civil Procedure Code, S. 115.

In a claim petition under O. 21, R. 58, C. P. Code, the only issue which the Court has to decide is whether the petitioner is in possession of the property in his own right, real or professed, but without reference to the judgment-debtor. Where the Court does not go into that question but dismisses the claim on the ground the title of the petitioner was not good, the High Court will interfere in revision under S. 115, C. P. Code, as the refusal

to decide an issue imposed by Law amounts to a failure to exercise a jurisdiction vested in it by law. 28 M.L.J. 327; 60 I. C. 616 followed.

P. G. Krishna Aiyar for Petitioner.

Muhammad Ibrahim and *G. Ramakrishna Aiyar* for Respondent.

T. S. V.

Spencer and Odgers, JJ.
2nd February, 1925. } *A. S. No.* 347 *of* 1922.

Deed—Construction—Mortgage by conditional sale—Tests of—Price not the true value—Absence of bargain—Liability to pay interest, costs of improvements, registration and re-conveyance—Effect.

Two documents were executed on the same day within a few hours of each other, and registered together. One was a deed of ostensible sale and the other an agreement to reconvey. The consideration paid did not represent the true value which was much in excess, nor was there any evidence of a bargain as to price. There was an agreement to pay interest, and to bear the costs of repairs, improvements, registration expenses and the costs of reconveying the property. *Held,* under these circumstances there was no out and out sale but only a mortgage by conditional sale. 47 Mad. 729 (P.C.) followed.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Appellant.

K. Narasimha Aiyar for Respondent.

T. S. V.

Devadoss and Wallace, JJ.
2nd February, 1925. } *C. R. P. No.* 119 *of* 1923.

Provincial Small Cause Courts Act, Sch. II, Art. 31—*Suit for damages—Use and occupation—Legal representative of tenant holding over—Nature of suit—If cognizable by a Small Cause Court.*

A suit for damages for use and occupation against the legal representative of a tenant holding over is in effect a suit for mesne profits within the meaning of Art. 31 of Sch. II of the Provincial Small Cause Courts Act and hence is not cognizable by a Small Cause Court. A tenant holding over is a trespasser. 31 Mad. 163; 25 Mad. 103 (F.B.) followed; 22 Mad. 149; 24 Mad. 118 distinguished.

P. Satyanarayana Rao for Petitioner.
K. Kameswara Rao for Respondent.
T. S. V.

Phillips, J.
2nd February, 1925. } *S. A. No.* 1609 *of* 1922.

Madras Estates Land Act—Ryoti holding—Joint owners—Payment of whole rent by one—Charge if created—Enforceability—Civil and Revenue Courts.

One of three persons jointly owning a ryoti holding in a Zemindari paid the full rent of the holding to the Zemindar. *Held,* he was entitled to a charge on the shares of the others in respect of such payment. In this respect there is no difference between "revenue" under the Revenue Recovery Act and "rent" under the Madras Estates Land Act. 26 Mad. 686 followed. The decision in 39 M. L. J. 30 which holds that such a charge can be enforced only in Revenue Courts goes too far. Case-law discussed.

V. Ramadoss for Appellant.
P. Somasundaram and *Satyanarayana* for Respondents.
T. S. V.

Spencer and
Ramesam, JJ.
3rd February, 1925. } *A. S. No.* 128 *of* 1922.

*Hindu Law—Maintenance—Concubine — Rights of—*Avaruddha Stree—*Right of residence—Maintenance and arrears if a charge.*

A permanently kept concubine who has borne an illegitimate daughter to her paramour is entitled to maintenance out of his estate, if she satisfies the definition of an *avaruddha stree* according to the Mitakshara. Text-law and cases fully reviewed. Their Lordships gave her also a right of residence in her paramour's bungalow where she had lived with him, and held that such right was included in her right of maintenance. Both the maintenance right and the arrears that had accrued would be a charge on the estate.

C. S. Venkatachari and *S. Sundararaja Aiyangar* for Appellants.

T. R. Ramachandra Aiyar, B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Respondents.
T. S. V.

PRIVY COUNCIL APPEALS.

22nd January.—*Motilal I. Gandhi* v. *H. Moosa H. Mohamed.* (Appeal No. 99 of 1923 from the High Court, Bombay.) Coram *Lord Shaw, Lord Carson, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.*

The action was for specific performance of a contract, dated the 27th February, 1919, for the sale of a house and land at Ardeshir Dady Street, Bombay, by the appellant to respondent. The sale was to have been completed within two (subsequently extended, at respondent's request, to three) months, but it is alleged that the respondent delayed completing until the 18th August, 1919, when he found a purchaser at a profit of Rs. 1,000. The appellant terminated the contract because of the delay, and the respondent on the 14th October, 1919, brought an action for specific performance. The question now is whether the appellant was justified in putting an end to the contract, and whether the respondent is entitled to specific performance. The High Court on its Original Side decided the question in the appellant's favour, but on its Appellate Side in favour of the respondent.

E. B. Raikes for Appellant.

The respondent was not represented.

Appeal allowed with costs.

22nd January.—*Adappa and others* v. *Gundappa B. Desai and another.* Judgment in this appeal has been reserved.

23rd and 26th January.—*Sura Lakshmiah Chetty and others* v. *Kothandarama Pillai.* (Appeal No. 8 of 1924 from the High Court, Madras.) Coram *Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.*

The litigation relates to the ownership of two houses (Nos. 4 and 5, Nainiappa Naick Street, Madras) alleged to have been bought by Chokalinga (respondent's father) with his own money on the 12th May, 1919, in the name of his wife, Lashmi Ammal. The question raised on the appeal is whether, as held by the High Court in its original jurisdiction, the real owner is Chokalinga (who has since been declared bankrupt), or, as held by the Appellate Court, Lakshmi Ammal, since deceased. The

appellants contend that the weight of the evidence is in favour of the finding of the Court of First Instance.

L. de Gruyther, K. C. and *B. Dube* for Appellants.

The respondent was not represented.

Judgment has been reserved.

28th and 29th January.—*Diwan Chand Kirpa Ram & Co.* v. *Weld & Co.* (Appeal No. 149 of 1923 from the High Court, Lahore.) Coram *Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.*

The question here is whether the respondents, who acted as the appellants' brokers and agents for sale and purchase of goods, were right in closing, without the appellants' authority, on the 11th December, 1916 (*i.e.*, before their due date) two contracts, dated the 20th and 24th November, 1916, for the sale to the appellants of (*a*) 100 bales of New York cotton at 20-80 cents per lb., delivery March; (*b*) 200 bales of Liverpool American cotton at 12-30 cents per lb., delivery March-April, 1917. The appellants contend that the Rs. 13,500 which the respondents held to their credit was sufficient cover for these two contracts, while the respondents allege that their demand for a further Rs. 5,000 in respect of these and two other contracts for 400 bales was reasonable.

A. M. Dunne, K. C. and *S. Hyam* for Appellants.

A. T. Miller, K. C. and *J. Dickinson* for Respondents.

The appeal is proceeding.

A. de M.

HIGH COURT.

Odgers, J.
2nd February, 1925. } *S. A. No.* 1160 *of* 1923.

Hindu Law—Joint family—Arrangement for management of family charity—Turns—Legatee under will of one branch—Rights of.

Two Branches of a Hindu family agreed to manage certain family charities by turns of five years each and the deed provided that they and their *vars* should so manage according to *parampara*. A legatee under the will of one of the branches claimed the right to manage in place of that branch. *Held,* the words *vars* and *parampara* were wide enough to include his claim.

K. Narasimha Aiyangar for Appellant.

K. V. Krishnaswami Aiyar and N. Swaminatha Aiyar for Respondent.

T. S. V.

Odgers, J.
3*rd February,* 1925. } *S. A. No.* 241 *of* 1922.

Hindu Law—Family partition—No document—Assignment of property to sister's son—If conveys title.

Where in a family partition among father and sons, properties were set apart for the father's sister's son, but there was no document executed, the transaction stands on the same basis as a gift and, in the absence of a registered document, no title is thereby conveyed to him. 17 C. W. N. 62 dissented from ; S. A. No. 225 of 1920 followed. 40 Cal. 966 (P. C.) and 18 I. C. 636 referred to.

C. V. Anantakrishna Aiyar for Appellants.

K. Bhashyam Aiyangar for Respondent.

T. S. V.

Phillips and Krishnan, JJ.
3*rd February,* 1925. } *A. S. No.* 228 *of* 1921.

Transfer of Property Act, S. 52—"*Transferred or otherwise dealt with*"—*Meaning of—Hindu reversioner—Suit for possession—Alienation and adoption challenged—Usufructuary mortgagee in possession—Redemption* pendente lite—*Liability for mesne profits.*

A Hindu reversioner sued for possession of certain properties in the hands of an usufructuary mortgagee from an alienee from an adopted son and challenged therein the adoption and alienation. During the pendency of the suit, the mortgage was redeemed by being paid in cash a portion of the mortgage amount and for the balance by the execution of a simple mortgage deed. The reversioner succeeded in his suit and claimed as against the usufructuary mortgagee defendant mesne profits not only up to the date of redemption when possession was given up, but also for the subsequent period. *Held,* allowing the mortgagor to enter into possession amounted to a "transfer

or other dealing with the property" within the meaning of S. 52, Transfer of Property Act, and hence he was liable for mesne profits even after possession had been given to the mortgagor. 43 Mad. 696; 6 L. W. 568 referred to.

Semble if the mortgagee defendant had been redeemed against his will, his liability for mesne profits subsequent to giving up possession might stand on a different footing.

S. Muthiah Mudaliar for Appellant.

T. Arumainathan Pillai and *V. Ramaswami Aiyangar* for Respondents.

T. S. V.

Phillips and Krishnan, JJ.
3rd February, 1925.
A. S. No. 277 *of* 1921.

Religious endowment—Scheme—Productive and unproductive properties—Allotment of former to Devasthanam and latter to Hukdar—*Intention—Exchange of unproductive lands for productive ones—Effect—*Hukdar *also a member of Committee—Election of office.*

Where under a scheme relating to a religious endowment, the productive lands were under the Devasthanam management and the unproductive ones under the *Hukdar* of a *Kattalai* who could bestow personal attention to the same, and subsequently the latter were exchanged for highly productive lands, the Devasthanam would thereafter become entitled to the properties taken in exchange, as that is in full consonance with the intention of the scheme.

In a case where the *Hukdar* of a *Kattalai* is also a member of the Committee which has powers of supervision over the *Kattalai* he is not entitled to keep both the offices, but has to elect as between the two.

S. Srinivasa Aiyangar and *M. Patanjali Sastri* for Appellant.

C. V. Anantakrishna Aiyar, K. V. Krishnaswami Aiyar and *P. S. Narayanaswami Aiyar* for Respondents.

T. S. V.

Odgers, J.
4th February, 1925.
S. A. No. 392 *of* 1922.

Transfer of Property Act, Ss. 83, 84, 103—*Mortgagee—Legal representatives major and minor sons—Deposit of amount—*

Petition mentioning one of the legal representatives was a minor under the guardianship of the other—Civil Procedure Code, O. 32, Rr. 3 to 6.

Where the legal representatives of a Hindu mortgagee were his two sons, one of whom was a major and the other a minor, and the mortgagor deposited money and put in a petition mentioning the fact that one of the mortgagees was a minor under the guardianship of his elder brother, it is not a sufficient or valid tender, so as to prevent the running of interest from that date. 44 All. 64 ; 45 All. 273 ; 27 Bom. 23 followed.

The provisions of O. 32, Civil Procedure Code, regarding appointment of guardians should be strictly followed. Even the manager of a joint Hindu family when appointed guardian *ad litem* for a minor must furnish security before he draws out a minor's share of money. 29 I. C. 245; 47 M. L. J. 389 followed.

K. Y. Adiga for Appellants.

K. Sundara Rao for Respondents.

T. S. V.

Spencer and Odgers, JJ.
5th February, 1925.
} *A. S. No. 175 of 1922.*

Hindu Law—Will—Ancestral properties—Guardians for minor son—Alienation of portion of properties to widow in lieu of maintenance—Breach of trust—Mesne profits—Liability for.

A Hindu father died leaving a will in respect of ancestral properties in his hands and thereby appointed three guardians for his minor son, one of whom was the minor's natural mother. The mother along with the other two guardians conveyed a small portion of the estate to a co-widow in lieu of her maintenance claim. The latter died a few years later after bequeathing the property to her own brothers. In a suit by the minor after attaining majority to set aside the alienation and claiming mesne profits from the date of the co-widow's death, the defence was that the alienation was a fair family arrangement. *Held* per *Spencer, J.*—The alienation being an absolute one in lieu of maintenance, was *prima facie* a breach of trust and hence liable to be set aside ; the will itself was

invalid, but if the alienation had been for a necessary purpose, the mother as natural guardian could bind the minor, and the mere fact that she did so along with two others would not render the transaction void.

Per Odgers, J.—The alienation cannot amount to a family arrangement and be validated on that basis.

Per curiam.—The transaction being voidable, mesne profits could be awarded only from the date of repudiation which in this case was the institution of the suit.

T. Rangachari, A. Krishnaswami Aiyar, N. K. Tirumalachari and *S. Rajagopalachari* for Appellants.

S. Varadachari and *P. V. Krishnaswami* for Respondent.

T. S. V.

The Chief Justice and Krishnan, J. *5th February,* 1925. } *Ref. C. No.* 19 *of* 1924.

Income-tax Act, Ss. 23 (2) *and* 63—*Person—If includes firm —Service on partner—If effective.*

Under S. 23 (2) of the Income-tax Act (XI of 1922) the word "person" includes a firm carrying on business and the person who has made the return in the case of a firm is to be deemed to be the firm itself and not to have acted in his personal capacity. Service on any partner under S. 63 is a good service for the purpose of S. 23 (2).

F. S. Vaz for Assessee.

M. Patanjali Sastri for the Commissioner of Income-tax.

T. S. V.

Waller, J. *6th February,* 1925. } *O. P. No.* 196 *of* 1924.

Madras High Court, Letters Patent Cl. 17—*Power of High Court—Indian minor residing outside ordinary original civil jurisdiction—Power to appoint guardian.*

In the case of infants, other than European British subjects, residing outside the ordinary original civil jurisdiction of the Madras High Court, a Judge of the High Court sitting on the original side has no power to appoint a guardian of the person or property. Section 3 of the Guardians and Wards Act, and clauses 22 and 32 of the Charter of the Supreme Court referred

to. 4 All. 129; 51 Cal. 206 folld.; 16 Bom. 634; 19 Bom. 96; 21 Bom. 137; 25 Bom. 353 referred to; observations of Sir Arnold White, C. J. in 25 M. L. J. 661 at pp. 684, 685 not followed.

E. L. Thornton and T. S. Krishnaswami Aiyangar for Petitioner.

The Advocate-General instructed by the *Government Solicitor* and *K. Kutti Krishna Menon* for Respondent.

T. S. V.

The Chief Justice and Krishnan, J.
6th February, 1925. } *O. S. A. No.* 46 *of* 1924.

Civil Procedure Code, O. 2, R. 2—Applicability—Mortgage—Separate covenants for interest and principal—Default clause—Construction of—Suit for interest only—Claim by Official Assignee that mortgage was invalid—Rights of mortgagee if barred.

A mortgage deed contained a clause that interest was to be paid by the 5th of every month, and it was followed by another clause that the principal was to be paid when demanded. These were followed by a clause which recited that "in default of doing so, the mortgagee could proceed against the mortgagor, his heirs and the properties." The mortgagee made a demand for principal and interest and followed it up with a suit for interest only. Subsequently the mortgagor became insolvent and the Official Assignee applied to Court to have the mortgage declared null and ineffective. *Held*, on a construction of the deed, the default clause and the notice demanding the money were only in the nature of a threat. Hence the suit for interest alone would not under O. 2, R. 2 bar a subsequeut suit for the mortgage money. 44 All. 121 (P.C.) and 4 Lah. 32 (P.C.) followed. *Held also* the suit not being one by a mortgagee to enforce his claim under the mortgage after instituting a prior suit for interest only, but a claim in insolvency by the Official Assignee to get rid of a mortgage, O. 2, R. 2, would not apply to the case.

Vere Mockett instructed by *Grant and Greatorex* for Appellant.

R. N. Aingar and K. S. Narayana Aiyangar instructed by *Varadaraja Mudaliar* for Respondent.

T. S. V.

The Chief Justice and Krishnan, J. 9th February, 1925. — A. S. No. 306 of 1922.

Hindu Law—Debts—Mother as guardian borrowing money —Construction of big house in ancestral village—If a necessity—Rights of creditor—Charge on property.

A Hindu mother, who was the natural guardian of her minor sons, borrowed money under a promissory note for the purpose of constructing a bigger house in their ancestral village in place of a smaller one which they already had. In a suit by the creditor, *held* the construction of the bigger house was neither a necessity nor a benefit to the minors and hence the creditor was not entitled to a decree against their estate, but he could be awarded a decree charging the amount on the house which was put up out of the moneys borrowed. 47 Mad. 449 followed; (1902) 1 Ch. 1 explained and distinguished.

S. Varadachari and *K. Narasimha Aiyangar* for Appellant.

A. Krishnaswami Aiyar and *T. S. Venkatesa Aiyar* for Respondents.

T. S. V.

The C. J., Phillips and Kumaraswami Sastri, JJ. 10th February, 1925. — C. R. P. No. 113 of 1924.

Madras District Municipalities Act (V of 1920), S. 45 (c)—Non-payment of Municipal taxes—Name erroneously entered in the Municipal electoral roll—Election—If can be impugned on the ground of non-payment of tax.

Even where in contravention of S. 45 (*c*) of the District Municipalities Act, a person's name is entered in the Municipal electoral roll though he is in arrears with respect to the Municipal taxes, and he is thereafter elected an election court cannot go into the question whether his name was properly on the rolls.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Petitioner.

K. S. Jayarama Aiyar and *K. G. Srinivasa Aiyar* for Respondent.

T. S. V.

PRIVY COUNCIL APPEALS.

29th January.—*Diwan Chand-Kirpa Ram & Co.* v. *Weld & Co.*

Judgment in this case was reserved.

29th and 30th January.—*Hope Prudhome & Co.* v. *Hamel & Horley.* (Appeal No. 76 of 1924 from the High Court, Madras.) Coram : *Lord Wrenbury, Lord Phillimore* and *Lord Carson.*

The question in this appeal is whether the respondents' counter-claim against them (in a suit which the appellants brought against them, and was decreed) for £4,361-7-10 as damages for breach of an alleged contract, is valid. The respondents contend that the appellants in October 1916 agreed to sell to them 300 tons of ground-nuts at 59 francs per kilogram for December 1916—January 1917 shipment, deliverable at Marseilles, and that the above was the amount of the damages as ascertained by an award or decree of the Courts of France having, by the terms of the contract, jurisdiction over the matter. The appellants deny that they ever made such a contract, and say that they were not a party to the award or decree.

E. B. Raikes for Appellants.

A. Neilson, K. C. and *H. O'Hagan* for Respondents.

Judgment has been reserved.

30th January.—*Tilakdhari Singh and others* v. *Maharaja Kesho Prasad Singh.* (Appeal No. 91 of 1923 from the High Court, Patna.) Coram : *Lord Shaw, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

The dispute was as to the area of certain added alluvial land in the Mauza of Sheopur Diar, the plaintiffs contending that the area is 2,877 bighas and appertains to their estate (the Dumraon Raj), while the appellants (defendants), who are the Zamindars of the Mauza, allege that it is only 569 bighas 12 cotas.

Sir G. Lowndes, K. C. and *D. McNair* for Appellants.

L. de Gruyther, K. C. and *J. M. Parikh* for Respondents.

The appeal was dismissed with costs.

N R C

30th January.—*N. S. P. K. L. Palaniappa Chettiar* v. *K. V. Kathiresan Chettiar and others.* (Appeal No. 58 of 1923 from the High Court, Madras.) Coram : *Lord Wrenbury, Lord Phillimore* and *Lord Carson.*

This appeal arises out of a contract for the re-sale of 10 bales of mull alleged to have been sold to the defendant (appellant) on the 27th August, 1918, delivery whereof was improperly refused by him. The trial judge held that the contract was not proved, and dismissed the suit, but on appeal the High Court gave the plaintiff a decree for Rs. 14,082-6-10.

The first respondent was plaintiff in the suit, the second respondent is his assignee of the decree passed on appeal, and the third respondent is the Official Assignee of the estate of the first respondent, who has been adjudicated an insolvent.

K. Brown for Appellant.

K. V. L. Narasimham for Respondents.

Judgment has been reserved.

30th January, 2nd, 3rd and 5th February.—*Pramatha Nath Mullick* v. *Prayumna Nath Mullick and others.* (Appeal No. 59 of 1924 from the High Court, Calcutta.) Coram : *Lord Shaw, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

This appeal relates to the right of worship of certain family Thakurs, and the question now raised is whether the appellant, as one of the Thakurs, is or is not entitled, during his term of worship, to remove the images of the Thakurs to his own residence. The respondents contest the right on the ground that it contravenes, if not Hindu Law and usage, an express provision in a deed of trust made by one of the predecessors-in-title of the parties in April, 1888.

A. M. Dunne, K. C. and *S. Hyam* for Appellant.

L. de Gruyther, K. C. and *J. M. Parikh* for Respondents.

The appeal is proceeding.

HIGH COURT.

Spencer and Ramesam, JJ. — *A. S. No.* 187 *of* 1921.
10th February, 1925.

Hindu Law—Joint family—Father and minor son—Partition—Alienation to meet debts—Suit by son to set aside partition and alienation—Nature of debts—Burden of proof—Apportionment of debts.

A Hindu father effected a partition of properties as between himself and his minor son and subsequently alienated properties falling to his share to pay off certain debts. The son after attaining majority sued to set aside the partition and alienation on the basis of various acts of extravagance and immoral debts. *Held*, as the alienation was subsequent to the partition, the onus was on the son to prove the immoral nature of the debts; and even if the debts were due to acts of extravagance and were personal, they could be apportioned to both the sharers.

S. Varadachari and *K. S. Champakesa Aiyangar* for Appellant.

T. Rangachariar and *K. R. Rangaswami Aiyangar* for Respondents.

T. S. V.

The C.J., Phillips and Kumaraswami Sastri, JJ.
10th February, 1925. } *C. R. P. No.* 541 *of* 1923.

Madras District Municipalities Act (V of 1920)—Rules under—Rr. 14, 17—Voting paper not marked by polling officer —Rejection of vote—Propriety of—Interference—Revision.

A candidate at a Municipal election having been defeated by one vote, filed an election petition and therein he complained that a vote in his favour had been rejected on the ground the ballot paper did not bear the initials of the polling officer as prescribed by R. 14 of the Rules for the Conduct of Elections. R. 17 was the only rule which provided for the invalidity of votes and referred to marked votes. The District Judge held the vote had been properly rejected. *Held per curiam* the word "marked" in R. 17 might be construed as marked by the polling officer and not by the voter and hence the District Judge cannot be said to have acted without jurisdiction in order to justify interference in revision.

Per The Chief Justice : *Quaere* if 47 Mad. 239 (F. B.) was right in deciding that S. 115, Civil Procedure Code, applied to an order of a Court specially constituted and which the rules declared to be final ?

Chidambaram and Marthandam for Petitioner.

S. T. Srinivasagopalachari for Respondent.

T. S. V.

Krishnan and Waller, JJ.
11th February, 1925.

C. M. S. A. No. 63 *of* 1922.

Civil Procedure Code, O. 41, *R.* 23—*Findings called for from District Judge—Fresh evidence allowed—District Judge if can delegate functions—Legality—Transfer of Property Act, S.* 83—*Interest—Money deposited—Subsequent drawing of—Effect.*

The High Court in a certain case called for findings from the District Court after taking fresh evidence. The District Judge delegated his functions to the Court of first instance. *Held,* he could not do so except with the permission of the High Court. Whether the proceedings are rendered wholly illegal will depend on the facts and circumstances of each case.

Where money deposited in Court under S. 83, Transfer of Property Act, is on the passing of a decree for redemption drawn out of Court to be deposited to the credit of that suit, *held* interest does not cease to run during such period as the money was out of Court and beyond the reach of the mortgagee. 35 Mad. 44 followed : 44 All. 198 and the opinion of Phillips, J. in 40 Mad. 804 not followed.

A. V. Narayanaswami Aiyar for Appellant.

P. V. Krishnaswami Aiyar for Respondent.

T. S. V.

The C. J., Phillips and Kumaraswami Sastri, JJ.
11th February, 1925.

C. R. P. No. 115 *of* 1924.

Madras District Municipalities Act (V of 1920)—*Rules for the decision of Election disputes—R.* 12—*Election of candidate set aside on the ground of disqualification—Procedure to be adopted—Fresh election or declaring the next highest candidate elected.*

At the instance of a defeated candidate at a Municipal election, the successful candidate was unseated on the ground he was interested in a subsisting contract made with the Municipal Council and the Election Court ordered a fresh election to take place. The defeated claimant who had secured the next highest number of votes claimed to be declared elected. *Held,* in the absence of proof to the effect that the electorate knew of the disqualification of the successful candidate, the proper

procedure in such cases is to order a fresh election. (1904) 1 K. B. 74 followed.

D. Ramaswami Aiyangar for *C. S. Venkatachari* for Petitioner.

T. V. Ramanatha Aiyar for Respondent.

T. S. V.

Phillips, J.
12th February, 1925. } *S. A. No.* 276 *of* 1922.

Contract Act, S. 69—Bound by law to pay—Meaning of—Suit for re-imbursement—Attachment before judgment—Effect of.

A creditor made an attachment before judgment of two properties belonging to his debtor. The latter made an outright alienation of one of the properties free from all encumbrances and then sold the other property, the vendee of the latter undertaking to pay off the claims of the creditor. He however failed to do so and the creditor realised this amount from the purchaser of the first property, whereupon the purchaser sued the purchaser of the second property for reimbursement. *Held,* he was entitled to do so under S. 69, Contract Act. 26 M. L. J. 66; 42 Bom. 93; 4 Cal. 369; 23 C. L. J. 125; 39 Mad. 795 followed; 32 M. L. J. 347 explained and distinguished.

Effect of attachment before judgment explained. 47 Mad. 483 : 46 M. L. J. 415 (F.B.) referred to.

T. M. Krishnaswami Aiyar and *V. N. Venkatavaradachari* for Appellant.

L. S. Veeraraghava Aiyar for Respondent.

T. S. V.

Devadoss and Wallace, JJ.
12th February, 1925. } *C. M. A. No.* 39 *of* 1924.

Hindu Law—Succession—Dancing girl—Descendants of—Collateral succession—Heritable blood—Rules of Hindu Law—Applicability.

The descendant in the third degree of a dancing girl through a particular son claimed to succeed to the properties of a descendant in the fourth degree through another son. It was proved that the dancing girl had no fixed husband, that the paternity of the sons was unknown and that the parties were adopting Hindu customs and manners and living as Hindus. *Held* (1) the Hindu Law of Succession governed the case;

(2) though paternity was unknown, the rights of inheritance could be traced through the mother and there was heritable blood between illegitimate sons born of the same mother; (3) that such heritable blood extended even among descendants of such illegitimate sons of a common mother and they would have rights of succession *inter se* ; and (4) the bar to collateral succession of illegitimate sons applied only to succession to the estate of the relations of the putative father and not to descendants of the same mother. 2 M. H. C. R. 196; 27 Mad. 13; 8 M. I. A. 400 ; 21 Mad. 40 and texts referred to.

L. A. Govindaraghava Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

T. S. V.

Spencer and Ramesam, JJ.
13th February, 1925.
A. S. No. 314 *of* 1922.

Compromise — Consideration — Gift deed confirmed on payment of annual poruppu—*Subsequent suit challenging gift deed and compromise—Effect of—Failure of consideration—Subsequent suit for* poruppu—*If lies—Interest on* poruppu.

After gifting away a village, the donor made an attempt to get back the village but ultimately he recognised the validity of the gift on condition the donee undertook to pay annually Rs. 400 as *poruppu*. The compromise was acted on for a long time, and then the successor of the donor sued to recover the village with mesne profits, impeaching both the gift and the compromise. During the pendency of this suit, the plaintiff therein instituted two other suits for *poruppu* accruing due under the compromise lest the claim therefor become barred in case the first suit failed ; but these were kept pending the disposal of the first suit. The suit challenging the gift deed and compromise was dismissed and the donees in the suits for *poruppu* pleaded that as the gift deed had been challenged, the consideration for the compromise failed and hence they were not liable. *Held*, there was no failure of consideration entitling the donees to rescind the compromise agreement, as the agreement was executed and not executory. 31 Cal. 584 (P.C.) distd.; 7 M. L. J. 33 followed. The plaintiff was not, however, entitled to interest on the *poruppu* during the pendency of the prior suit,

T. R. Ramachandra Aiyar, V. Sundaram Aiyar and *R. Kesava Aiyangar* for Appellants.

L. A. Govindaraghava Aiyar and *S. Sundararaja Aiyangar* for Respondent.

T. S. V.

Wallace, J.
13th February, 1925. } *C. M. S. A. No.* 57 *of* 1924.

Transfer of Property Act, S. 122—*Partition—Reference of disputes to arbitration—Plaintiff directed to convey item in gift to minor son of defendant—Decree—Failure to convey—If could be compelled to execute gift deed.*

In partition proceedings, the dispute between the parties was referred to arbitration and an award was passed that the plaintiff should convey an item of property in gift to the minor son of the defendant. A decree was passed in terms of the award. The plaintiff failed to comply with the decree and after the minor's death his mother as his heir and legal representative applied for relief under the decree. *Held,* the gift was not a voluntary conveyance within the meaning of S. 122, Transfer of Property Act, but a transfer for consideration and the plaintiff could be compelled by Court to execute a deed of conveyance.

O. Thanikachalam Chetty for Appellant.

T. V. Venkatrama Aiyar and *T. V. Ramanatha Aiyar* for Respondent.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ.
17th February, 1925. } *C. M. A. No.* 396 *of* 1922.

Hindu Law—Widow—Surrender—Agreement to pay a sum of money to the daughter of the surrenderor—Effect—Test as to validity of surrender.

Where at the time of a surrender by a Hindu widow, it was agreed that the surrenderee should pay Rs. 4,000 to the daughter of the surrenderor, the undertaking did not necessarily invalidate the surrender, provided it was a reasonable arrangement and not a device to divide the estate. But a surrender though good, as not being a device to divide the estate

might still be bad as not being *bona fide*. The two conditions are different and it must be determined on the facts of each case, if both the conditions are satisfied. 42 M. 523; 47 Cal. 466 (P.C.); 48 Cal. 100 referred to.

T. L. Venkatrama Aiyar and *R. Krishnaswami Aiyangar* for Appellant.

P. V. Krishnaswami Aiyar for Respondent.

T. S. V.

Phillips, J.
17*th February*, 1925. } *S. A. No.* 520 *of* 1923.

Civil Procedure Code, S. 102—*Suit for money due under a security bond—Nature of—Small cause—Second appeal.*

A suit for money due under a security bond is one of a small cause nature and where the amount claimed is less than Rs. 500, there is no right of second appeal. 38 Mad. 523 followed.

N. Chandrasekhara Aiyar for Appellant.

The Government Pleader for Respondent.

T. S. V.

Phillips, J.
17*th February*, 1925. } *S. A. No.* 1635 *of* 1923.

*Malabar Law—Maintenance—*Karar—*Binding nature of—Subsequent* Karnavans—*Allotment to tavazhi—Suit for increased maintenance—Parties to suit.*

Where the *Karnavan* of a Malabar Tarwad sets apart under a *Karar* properties for the maintenance of a branch, the arrangement is binding on succeeding *Karnavans* also and cannot be set aside without making other arrangements in lieu thereof. Nor can junior members of the branch sue for separate maintenance without impleading the other members of the tavazhi and offering to give up or take into consideration the properties allotted for maintenance. 32 M. L. J. 97 followed; 18 I. C. 234; 21 I. C. 755 distd.

K. S. Viswanatha Aiyar for Appellant.

B. Pocker for Respondents.

T. S. V.

PRIVY COUNCIL.

Petitions for Special Leave to Appeal.

Coram : *Lord Shaw, Lord Carson, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

20th January.—*Mohamed Sher Khan* v. *Kamal-un-Nissa and another.*

The Subordinate Judge of Kheir on the 26th October, 1922, dismissed the petitioner's suit against his daughter and son-in-law by which he had claimed to have the deed which he had executed on the 5th June, 1915, in favour of his said daughter, and which he alleged to be an *areat,* cancelled and revoked by a subsequent deed of the 30th August, 1916. This judgment was affirmed on appeal by the Court of the Judicial Commissioner of Oudh ; hence the present application.

L. de Gruyther, K. C. and *S. Hyam* for Petitioner.

The respondents were not represented.

The petition was dismissed.

29th January.—*Raja Jagadish Chandra Deo Dhabal Deb* v. *Protap Chandra Deo Dhabal Deb.*

On the 17th November, 1921, the petitioner, who had extracted Probate of the Will of Raja Sahughera Deo (the owner of an impartible Zamindari known as the " Dhalbhum Estate," who had died on the 1st March, 1916) sued the respondent for possession of the Estate and mesne profits under the will. On the 21st August, 1922, the Subordinate Judge of Midnapore, in giving judgment for the petitioner, directed the mesne profits to come out of the Estate ; and upon an appeal and cross-appeal being taken to the High Court, Calcutta, the judgment was affirmed. The respondent's appeal to the Privy Council, by special leave, is pending, and accordingly the petitioner also applied for special leave to appeal.

L. de Gruyther, K. C. and *W. Wallach* for Petitioner.

A. M. Dunne, K. C. and *S. Hyam* for Respondent.

Petition granted.

29th January.—*Haveli Shah* v. *Khan Sahib Sheik Painda.*

On the 23rd November, 1922, the respondent instituted a suit before the District Judge, Quetta (Baluchistan) for damages

Rs. 6,88,000 for the wrongful seizure by Lala Sundara Das (petitioner's father) on the 1st January, 1920, of 4,589 camels at Seistan (Persia). The case raises issues as to limitation and the jurisdiction of the Baluchistan Courts in torts committed in Persia.

Sir G. Lowndes, K. C. and *A. Majid* for Petitioner.

The Hon'ble S. O. Henn-Collins for Respondent.

Petition granted.

2nd February.—*Secretary of State for India* v. *Steel Bros., Ltd.*

The Commissioner of Income-tax, Rangoon, referred to the High Court under Section 66 of the Indian Income-tax Act, 1922, the decision of the question "whether the transaction evidenced by the resolutions of the Indo-Burma Petroleum Co., Ltd., of July and October, 1921, by the returns of allotment, and by a contract also of the same months, involved a receipt by the respondents of any income, profits, or gains within the meaning of Sections 2 (15), 12 and 16 of the said Act, rendering them liable to super-tax under Section 55 for the year 1922-3 at 1 anna per Rupee on Rs. 30,97,492=Rs. 1,93,593-4-0. The Full Bench's decision followed that in *Commissioners of Inland Revenue* v. *Blott*, L.R. (1921) A.C. 171, but the Government contended that they should have followed rather *Swan Brewery Co.* v. *The King*, L. R. (1924) A. C. 231.

A. M. Dunne, K. C. and *R. P. Hills* for Petitioner.

A. M. Latter, K. C. and *C. King* for Respondents.

Petition dismissed with costs.

Appeals.

6th February.—*Pramatha Nath Mullick* v. *Prayumna Nath Mullick and others.*

The hearing of this appeal was concluded and judgment was reserved.

Coram : *Lord Shaw, Lord Carson, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

6th, 7th & 9th February.—*Kedarnath Goenka* v. *Anant Prasad Singh and others.* (Appeal No. 101 of 1923 from the High Court, Patna.)

The question here was whether an issue or inquiry as to the mesne profits of certain property from the 28th November, 1905 to the 29th May, 1914, directed by a decree or an order of His Majesty in Council, dated the 7th March, 1913, to be ascertained "at the execution stage" does or does not abate as to the rights of plaintiffs who die and whose legal representatives do not apply to be put on the record within the time limited by law. Both the Subordinate Judge of Monghyr and the High Court have held that such an inquiry was a "proceeding in execution of a decree" within the meaning of Order 22, Rule 12, and did not therefore abate under Rule 3.

A. M. Dunne, K. C. and *E. B. Raikes* for Appellant.

The respondents were not represented.

The appeal was dismissed.

9th February.—*Probhudas* v. *Ganidada.* (Appeal No. 168 of 1924 from the High Court, Calcutta.)

The question here is whether the provisions of the Indian Tariff Act (VII of 1894) for adjustment, as between the seller and the purchaser of duty-paid goods, of changes in customs-duty occurring after the contract, applies to a change of tariff-value. By two contracts, dated respectively the 15th and 18th December, 1922, the respondent sold to the appellant 462½ tons of white Java sugar at Rs. 14-1-0 and Rs. 14-6-0 per maund. On the 23rd December, 1922, the Government reduced the tariff-value of sugar from Rs. 26-4-0 to Rs. 16-4-0 per cwt. for the year 1923 ; hence the appellant claimed from the respondent the return of so much of the purchase-money as represented the difference in the amount of duty on the basis of the old tariff-value.

On the submission of a special case, the High Court decided in favour of the respondent, and this decision was affirmed on appeal.

W. Wallach for Appellant.

Sir G. Lowndes, K. C. and *E. B. Raikes* for Respondent.

Judgment has been reserved.

9th & 10th February.—*Ghulam Rasul Khan* v. *Secretary of State for India.* (Appeal No. 2 of 1924 from the High Court, Lahore.)

The question to be determined is whether, as held by the Subordinate Judge of Ludhiana, the plaintiff (appellant) is a Rajput, or, as held by the High Court on appeal, he is not. The appellant had instituted the suit with a view to obtaining registration of his land at Ramgarh, his acquisition of which, the Government contends, violates the provisions of the Land Acquisition Act (XIII of 1890).

L. de Gruyther, K. C. and *J. M. Parikh* for Appellant.

A. M. Dunne, K. C. and *K. Brown* for Respondent.

Judgment has been reserved.

10th & 12th February.—*Vaithilinga Mudaliar and others* v. *Srirangath Anni and others.* (Appeals Nos. 122—130 of 1923 from the High Court, Madras.)

These nine consolidated appeals relate to the " Kulikarai Estate " belonging to Vaithilinga Mudaliar, and the questions raised therein are whether—

(*a*) the suit instituted in 1905 by the next reversioners of Arunachalla Mudaliar after the death of his widow in 1902, is barred by limitation ;

(*b*) the said estate ever belonged to Arunachalla ;

(*c*) the parties being Sudras, the late Krishnaswami Mudaliar (husband of Srirangath Anni), who was alive at the time of Arunachalla's widow's death in 1902, was disqualified from inheriting his ½ share in the estate on the alleged ground that, prior to 1902, he renounced the world and entered the ascetic religious order of " Thambirans ".

Counsel representing the various parties interested are *Sir G. Lowndes, K. C., L. de Gruyther, K. C., J. M. Parikh, K. V. L. Narasimham* and *W. Wallach.*

The appeal is proceeding.

A. de M.

HIGH COURT.

Venkatasubba Rao, J.
1st February, 1925.

S. A. No. 161 *of* 1922.

Evidence Act, S. 116—*Estoppel—Landlord and tenant—Surrender by tenant to one of lessor's co-heirs—Whether estoppel continues.*

Surrender to one of several co-heirs of the original lessor is sufficient in law, to prevent the estoppel as between landlord and tenant laid down by S. 116 of the Indian Evidence Act operating.

M. S. Venkatrama Aiyar for Appellant.

Ch. Raghava Rao for Respondent.

C. A. S.

The Chief Justice and Krishnan, J.
5th February, 1925. — *A. S. No.* 349 *of* 1920.

Hindu Law—Alienation by father for antecedent debts which cover less than half the consideration for the sale—Binding nature of sale—Mesne profits—Liability for—Only from the date of repudiation of sale.

An alienee from the manager of a joint Hindu family is liable to account for mesne profits only from the date of the repudiation of the alienation, by the suing co-parcener, not necessarily for three years prior to the suit to set aside the alienation.

The same is the rule in the case of alienations by the father for alleged antecedent debts.

Where the antecedent debt in consideration of which the alienation purports to have been effected is found true to the extent of less than a half, the alienation is set aside at the instance of the son on condition of his paying the alienee half of the amount of debt so found true.

A. Venkatrayaliah and *K. Kameswara Rao* for Appellants.

Ch. Raghava Rao for Respondent.

C. A. S.

Phillips, J.
6th February, 1925. — *S. A. No.* 1632 *of* 1922.

Deed of maintenance—Delivery of possession under deed—Absence of registered instrument—Whether deed invalid—Part performance.

Where an unregistered deed provided that certain properties should be enjoyed by B for her life towards maintenance and after her by C, and B enjoyed them till her death and delivered possession of the properties to C, in a suit in ejectment

and specific performance by a purchaser from C against the original grantors

Held, that by virtue of the doctrine of part performance the absence of a registered instrument did not invalidate the title of C. 46 Mad. 919 (F. B.) followed.

S. Ranganadha Aiyar for Appellant.

B. Somayya and *E. Krishnamurthi* for Respondent.

C. A. S.

Devadoss, J.
6th February, 1925. } *Cr. R. C. No.* 606 *of* 1924.

Practice—Conviction by a Bench of Magistrates on the ground that defence version opposed to natural course of things—Conviction whether sustainable.

The judgment of a Bench of Magistrates which runs thus :— "The defence version is disbelieved as opposed to the natural course of things" is improper as containing no indication that the Bench accepted the prosecution case and no proper reasons for the conviction such as the law insists upon.

Ch. Raghava Rao for Accused.

J. C. Adam, Public Prosecutor, for the Crown.

C. A. S.

Odgers, J.
11th February, 1925. } *S. A. No.* 518 *of* 1922.

Practice—Statement as to an admission made by a pleader in the judgment of the lower Court—Whether statement can be challenged in appeal from the decision—Mode of challenge.

A statement in the judgment of the lower Court as to an admission having been made by the pleader ought not as a rule to be permitted to be challenged in appeal, the proper course for the aggrieved party in such a case being to have applied for rectification or review to the lower Court itself. 6 L.W. 437 (P. C.) ; 66 I. C. 433 ; 3 M. L. T. 212 relied upon.

B. Somayya for Appellant.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Respondent.

C. A. S.

Odgers, J.
12th February, 1925. } *S. A. No.* 394 *of* 1922.

Practice—Ownership set up and disproved—Whether a claim on the ground of easement may be granted—Presumption of a lost grant—Whether can be founded on a user of water for eighteen years.

Evidence in support of a claim of ownership which has been negatived cannot be founded upon to sustain a case of easement not set up in the pleadings.

Quaere, whether proved user of a right of water for 18 years is sufficient to found a presumption of lost grant of an easement. 16 Bom. 592 ; S. A. No. 266 of 1921 followed. 4 Cal. 699 (P. C.) distinguished.

Ch. Raghava Rao for Appellant.

P. Somasundaram for Respondent.

C. A. S.

Madhavan Nair, J.
17th February, 1925. } *C. M. S. A. No.* 37 *of* 1923.

Civil Procedure Code, Ss. 47 *and* 73*—Partition suit—Decree for payment of money to two persons—Transfer at the instance of one of them to another Court for execution—Attachment and sale —Application for rateable distribution—If lies—Second appeal—Maintainability.*

In a partition suit the District Munsif of Tiruvalur directed the first defendant to pay a sum of money to the plaintiff and an equal sum to second defendant. At the instance of the plaintiff the decree was transferred to the Negapatam Court for execution. The properties of the first defendant were attached and sold and then the second defendant applied to the same Court for execution and rateable distribution of the sale proceeds. *Held,* in the absence of an order for transmission of the decree from the Tiruvalur Court to Negapatam at the instance of the second defendant he could not apply for execution or for rateable distribution ; *held also* (overruling a preliminary objection that no second appeal lay) that a question arising between parties to a suit claiming rateable distribution is one

relating to the execution of the decree within the meaning of S. 47. Case-law discussed.

M. Subbaraya Aiyar for Appellant.

K. V. Krishnaswami Aiyar for Respondent.

T. S. V.

Devadoss, J.
17th February, 1925. } *C. R. P. No.* 644 *of* 1924.

Civil Procedure Code, O. 6, R. 17—Suit by minor to set aside guardian's alienation—Sale deed in fraud of registration law—Amendment of plaint by adding allegation.

A person within three years of attaining majority sued to set aside an alienation of family properties made by his mother as guardian on the ground of absence of necessity, etc. Later, he applied to have the plaint amended by alleging in addition that the sale deed executed by his mother was void as being in fraud of the Indian Registration Act, since it included therein properties not belonging to the family merely to give jurisdiction to the particular Sub-Registrar who registered the document. *Held,* it was a fit case for amendment.

P. V. Krishnaswami Aiyar for Petitioner.

K. S. Sankara Aiyar for Respondent.

T. S. V.

Devadoss, J.
20th February, 1925. } *C. R. P. No.* 190 *of* 1923.

Arbitration—Award—Personal knowledge of arbitrator if can be imported—Effect of.

When matters in dispute are referred to arbitration, unless the parties by the terms of the reference agree that the arbitrator could decide the matter with reference to matters which are within his own knowledge, he cannot import his personal knowledge in deciding the disputes. 42 All. 185 followed.

S. Ramaswami Aiyar for Petitioner.

T. L. Venkatrama Aiyar for Respondent.

T. S. V.

Odgers, J.
19th February, 1925. } *S. A. Nos.* 1563 and 1564 *of* 1923.

Partition—Earlier suit for certain items of family property against one set of alienees—Later suit for omitted item against another set of alienees—Whether later suit barred by O. 2, R. 2 of the Civil Procedure Code—Estoppel—Landlord and tenant—Section 116, *Evidence Act—Co-sharers—Ejectment.*

Where A brought an earlier suit for partition against his brother and certain alienees and instituted a later suit for partition of an omitted item against another set of alienees and tenants who were not parties to the earlier suit, on objection being taken that the later suit was barred by O. 2, R. 2 of the Civil Procedure Code

Held, (1) that the later suit was not barred under O. 2, R. 2 as it was against another set of defendants who were not parties to the earlier suit. 25 M. 736; (1912) M. W. N. 728 ; 40 Bom. 367 and Caspersz on *Estoppel,* S. 658 relied upon ;

(2) that no co-sharer is competent to sue in ejectment against a trespasser without the co-sharers joining as plaintiffs. 39 Mad. 501; 75 I. C. 112 followed ;

(3) that Sec. 116 of the Evidence Act lays down a rule of estoppel well established by English cases that a tenant must surrender possession to the landlord before he can set up an adverse title against him. 37 All. 557 (P. C.) applied.

N. Chandrasekhara Aiyar for Appellants.

B. Somayya and *E. Krishnamurthi* for Respondents.

C. A. S.

The Chief Justice and Krishnan, J.
24th February, 1925. } *A. S. No.* 264 *of* 1921.

Specific Relief Act, S. 18 (*d*)—*Hindu family—Ancestral property—Agreement by father to sell—How far enforceable against subsequently adopted son—Vendee—Rights of—Refund of money—Lien on father's share.*

An agreement to sell entered into by a Hindu father in respect of ancestral property is not specifically enforceable against a subsequently adopted son, so far as his half share is concerned, but can be enforced against the half share of the father. 20 Mad. 354 followed.

N R C

If, however, the purchaser does not claim specific performance in respect of the father's half share, he is entitled to a refund of the purchase money paid together with interest, costs and compensation and has a lien on the father's share for the amounts due.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Appellants.

S. Varadachariar and *S. Panchapakesa Aiyar* for Respondents.

T. S. V.

Odgers, J.
24th February, 1925.

S. A. No. 459 *of* 1922.

Contract Act, S. 69—Applicability—Joint pattadars—Mortgagee from one setting aside sale for arrears of rent—If obtains charge.

A joint holding was sold for arrears of rent which had accrued and a mortgagee from one of the joint pattadars got the sale set aside by paying the money due. He then sued all the pattadars and the mortgagees from the other pattadars for the amounts he paid and claimed a charge on the holding for the same. *Held,* he was not in the position of a registered pattadar and hence not bound to pay the rent and S. 69 of the Contract Act would not apply to the case or give him a charge. 39 Mad. 795 ; 11 C. W. N. 403 ; 30 Mad. 35 ; 33 Mad. 41, followed. His remedy may be by a suit for contribution.

G. Lakshmanna and *A. Satyanarayana* for Appellant.

P. Somasundaram for Respondent.

T. S. V.

Spencer and Ramesam, JJ.
24th February, 1925.

A. S. No. 176 *of* 1922.

Mortgage—Subrogation—Mortgage by Hindu father—Debt binding—Subsequent partition between father and son—Debt payable by father—Fresh mortgage by father—Portion of consideration to pay off prior mortgage—Suit by subsequent mortgagee—Liability of son—Mortgage if kept alive for any purpose.

A Hindu father for himself and as guardian of his minor son executed a mortgage of some properties for a necessary purpose. Subsequently a partition was entered into between father and son and it was agreed that the mortgage debt was payable by the father. The father then created another mortgage over the property, a portion of the consideration being to discharge the prior mortgage. In a suit brought on this subsequent mortgage the son was also sought to be made liable on the ground that the 2nd mortgagee was subrogated to the rights of the prior mortgagee and the son was liable to the extent that mortgage was binding on him. *Held,* following 9 Cal. 961 (P. C.) and 10 Cal. 1035 (P. C.) the prior mortgage having been discharged by payment, the presumption was that it had been extinguished and could not be kept alive for any purpose. 39 M. L. J. 445 distinguished.

The decisions in 9 Cal. 961 and 10 Cal. 1035 are not in any way inconsistent with each other.

K. Rajah Aiyar for Appellant.

T. R. Ramachandra Aiyar, S. Sundararaja Aiyangar and *S. Jagadisa Aiyar* for Respondents.

T. S. V.

Odgers, J.
24th February, 1925. } *S. A. No.* 286 *of* 1922.

Civil Procedure Code, S. 47 *and O.* 21, *Rr.* 95, 97, 103—*Scope of mortgagee purchaser—Application for delivery of possession—Party referred to suit—Right of party—Appeal or suit—Remedies not concurrent—Investigation necessary under R.* 97.

At a sale held in pursuance of a mortgage decree, the mortgagee himself purchased the property. Thereafter in execution of a money decree another person purchased the same property and got into possession. The mortgagee purchaser then applied under O. 21, R. 95 and the Court passed an order referring him to a suit, obviously thinking it was a petition under O. 21, R. 97. He did not appeal against the order but filed a suit as provided by O. 21, R. 103. *Held,* the prior order was one under R. 95 and as S. 47, C. P. Code, applied, his remedy was by way of appeal and not by way of suit.

The remedies provided by S. 47 and O. 21, R. 103 are not concurrent, and where S. 47 applies a suit is barred. 29 M.L.J. 629 ; 39 M. L. J. 603 ; 52 I. C. 928 ; 43 Mad. 699 referred to.

An order under R. 97 should not be passed without investigation. 34 Cal. 491 ; 41 I. C. 640 ; 14 C. W. N. 346 followed.

A. Krishnaswami Aiyar and *B. Somayya* for Appellants.

K. V. Krishnaswami Aiyar and *K. V. Sesha Aiyangar* for Respondents.

T. S. V.

Phillips, J.
26th February, 1925. } *S. A. No.* 1329 *of* 1923.

Madras Estates Land Act, S. 56—*Suit for acceptance of patta —Dry and garden lands—Term in patta that tenant to pay higher rate if he used landlord's water for dry lands—Rate leviable—Dues payable to village officers—If to be included in patta.*

In a suit by a landholder for acceptance of patta, one of the terms in the patta was that if the tenant cultivated dry lands with the landlord's water, he should pay 9 *tooms* for acre. The Courts below held that a reasonable rate would be Rs. 6 per acre, while the landholder claimed that there was no discretion in the Court to fix any rate other than *sarasari*. *Held*, the patta could contain only a reasonable rate to be levied and not *sarasari*. 42 Mad. 702 explained.

The patta should not contain clauses relating to what is payable by tenants to village officers, as the latter have a right of direct recourse against the tenants.

A. Krishnaswami Aiyar for Appellant.

B. Somayya for Respondents.

T. S. V.

PRIVY COUNCIL.

CORAM : *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

I. Appeals.

19th February.—*Neki and others* v. *Chajju Ram and another.* (Appeal No. 71 of 1924 from Lahore.)

Plaintiffs (Appellants) here claimed a right of pre-emption of the village of Kagsar for Rs. 15,000 (*see* L. R. 49 I. A. 144).

J. M. Parikh for Appellants.

Sir G. Lowndes, K. C. and *G. D. McNair* for Respondents.

The appeal was dismissed.

19th February.—*Lal Rajendra Narain Singh* v. *Sunder Bibi.* (Appeal No. 48 of 1924 from Allahabad.)

The appeal turned on whether the appellant's rights in certain property (16 villages) attached were protected from attachment under S. 60 (*n*) of the Civil Procedure Code as being "a right to future maintenance". The appellant's interest in the villages was under the terms of a certain comp.omise decree of the 17th April 1915 made in a suit by the appellant to eject his brother from these villages and other property. The trial Judge on the 15th April 1918, following *Ghulab Kunwar* v. *Bansi Dhar,* I. L. R. 15 All. 317, dismissed the application for attachment, but his decision was reversed by the Appellate Court who held that a "right to future maintenance" meant only a "bare right," and that the appellant's interest, on the other hand, was attachable.

L. de Gruyther, K. C. and *E. B. Raikes* for Appellant.

K. V. L. Narasimham for Respondent

The appeal was dismissed.

19th and 20th February.—*Gajadhar Mahton* v. *Ambika Prasad Tewari and others.* (Appeal No. 17 of 1924 from Allahabad.)

The plaintiff (appellant) here sued to enforce a mortgage made the 28th August 1907 by Jai Gobind, Karta of the joint family of the defendants; and the defence raised by the son and brother of the mortgagor was that there had been no legal necessity for executing the mortgage. The Subordinate Judge of Basti, following *Sahu Ram Chandra* v. *Bhup Singh,*

L. R. 44 I. A. 126, had made a preliminary decree, which was reversed by the High Court.

L. de Gruyther, K. C. and *J. M. Parikh* for Appellant.

The respondents were not represented.

Judgment has been reserved.

II. Petitions for Special Leave to Appeal.

23rd February.—*Ramdeo Baboona* v. *Bhejraj Baboolal* (Allahabad).

The petitioner (plaintiff) having on the 23rd July 1919 sued for the recovery of a 2-anna share in the estate of Thakurdin deceased upon the death of his widow, Daryai Kunwar, the Subordinate Judge of Cawnpore made a decree in his favour, which, however, was reversed upon appeal.

W. Wallach for Petitioner.

Petition granted.

23rd February.—*Odeyram Kishenlal* v. *Phoolchand Fatehchand* (Lahore).

On the 14th July, 1918, the petitioners sued the respondents before the Subordinate Judge, Delhi, for Rs. 62,016, damages for breach of a contract dated the 30th November 1916 for the sale by the respondents to the petitioners of 100 cases of white shirtings. The respondents pleaded, under S. 39 of the Contract Act, cancellation of the contract by the petitioners (buyers) and acquiescence therein by the sellers (respondents) which defence was accepted by both the Courts in India.

L. de Gruyther, K. C. and *W. Wallach* for Petitioners.

The petition was dismissed.

25th February.—*Debi Charan* v. *The King-Emperor* (Oudh).

The petitioner and his son (Phulchand) were tried before the Additional Sessions Judge, Kheri, and four assessors for abetting the murder of Chedanusa (petitioner's father) by three other persons on the 18th February 1924, these latter being charged with the substantive murder, and jointly tried with them. The assessors unanimously found the petitioner and his son not guilty, but the Judge, disagreeing with them, convicted and sentenced them both to transportation for life under Ss. 302 and 109, Penal Code. The petitioner and his son having appealed,

the Crown prayed under S. 439 of the Criminal Procedure Code for enhancement of the sentences from transportation for life to death; whereupon the Court of the Judicial Commissioner of Oudh on the 18th September 1924, dismissed the petitioner's appeal, but allowed that of his son, who was acquitted, and sentenced the petitioner to death.

Sir G. Lowndes, K. C. for Petitioner.

Petition dismissed.

A. de M.

Phillips, J.
26th February, 1925. } *C. C. C. A. Nos.* 17 *and* 22 *of* 1923.

Mortgage—Suit for redemption—Acknowledgment of liability by mortgagee—Subsisting mortgage—Limitation.

A mortgage was executed in 1852 with a condition that if the mortgage amount is not paid in six years, the mortgagee was to become absolute owner and the mortgagee was put in possession of the properties. In 1871, the mortgagee executed a document in favour of one *V*, wherein he recited the previous mortgage, calculated principal and interest up to date, waived a portion and received the balance. The transferee was put in possession of the properties and directed to enjoy them with full rights of ownership as per terms of the original mortgage. A suit was filed in 1921 for redemption by the successors of the original mortgagor, relying on the 1871 document to save the bar of limitation. *Held*, that the document would not amount to an acknowledgment of liability of a subsisting mortgage and therefore the suit was barred by limitation.

T. V. Muthukrishna Aiyar and *T. D. Srinivasachari* for Appellant.

K. C. Desikachari and *K Narasimha Aiyar* for Respondents.

Wallace, J.
27th February, 1925. } *C. R. P. Nos.* 961 *and* 962 *of* 1923.

Civil Procedure Code, O. 9, R. 7—Scope of—Defendant declared ex parte—*Appearance at adjourned hearing—Right to go on with defence.*

Where a defendant is declared *ex parte*, but at the adjourned hearing of the suit he appears, he is entitled to go on there-

after with his defence. The only effect of the order making him *ex parte* is that he is bound by all proceedings between that date and the date of his appearance. The case is not as if an *ex parte* decree is passed against him in which case it will have to be set aside. 20 A. L. J. 39 folld.; 39 C. L. J. 279 referred to.

M. Patanjali Sastri for Petitioner.

V. Krishna Mohan, Ch Raghava Rao and *P. Bapiraju* for Respondents.

T. S. V.

Wallace, J.
27th February, 1925. } *C. M. S. A. No.* 102 *of* 1923.

Limitation Act, Art. 182—*Step-in-aid of execution—Decree against trustees—Removal of trustees by suit—Execution application against old trustees*—Bona fides—*Effect of—Reported and unreported rulings—Practice.*

During the pendency of a suit against the trustees of a temple, they were removed from office as the result of a suit filed by third parties against them. A decree was thereafter passed in the former suit against the trust properties. The decree-holder applied in execution against the old trustees but for want of prosecution it was dismissed. More than three years after decree but less than three years from the date of this application, the decree-holder applied again to execute the decree impleading therein the new trustees of the temple. *Held*, the prior application was one in accordance with law and amounted to a step-in-aid of execution. 17 Mad. 76; 20 Cal. 388; 33 Mad. 6 folld.; C. M. A. No. 185 of 1902; 32 All. 404 not followed; 36 All. 482 referred to.

Where there is a conflict between an unreported ruling and a reported one, the latter must be preferred to the former.

K. Kuttikrishna Menon for Appellant.

T. S. Anantaraman and *N. A. Krishna Aiyar* for Respondents.

T. S. V.

PRIVY COUNCIL.

CORAM : *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

I. Appeals.

19th February.—*Neki and others* v. *Chajju Ram and another.* (Appeal No. 71 of 1924 from Lahore.)

Plaintiffs (Appellants) here claimed a right of pre-emption of the village of Kagsar for Rs. 15,000 (*see* L. R. 49 I. A. 144).

J. M. Parikh for Appellants.

Sir G. Lowndes, K. C. and *G. D. McNair* for Respondents.

The appeal was dismissed.

19th February.—*Lal Rajendra Narain Singh* v. *Sunder Bibi.* (Appeal No. 48 of 1924 from Allahabad.)

The appeal turned on whether the appellant's rights in certain property (16 villages) attached were protected from attachment under S. 60 (*n*) of the Civil Procedure Code as being "a right to future maintenance". The appellant's interest in the villages was under the terms of a certain compromise decree of the 17th April 1915 made in a suit by the appellant to eject his brother from these villages and other property. The trial Judge on the 15th April, 1918, following *Ghulab Kunwar* v. *Bansi Dhar*, I. L. R. 15 All. 317, dismissed the application for attachment, but his decision was reversed by the Appellate Court who held that a "right to future maintenance" meant only a "bare right," and that the appellant's interest, on the other hand, was attachable.

L. de Gruyther, K. C. and *E. B. Raikes* for Appellant.

K. V. L. Narasimham for Respondent.

The appeal was dismissed.

19th and 20th February.—*Gajadhar Mahton* v. *Ambika Prasad Tewari and others.* (Appeal No. 17 of 1924 from Allahabad.)

The plaintiff (appellant) here sued to enforce a mortgage made on the 28th August 1907 by Jai Gobind, Karta of the joint family of the defendants ; and the defence raised by the son and brother of the mortgagor was that there had been no legal necessity for executing the mortgage. The Subordinate Judge of Basti, following *Sahu Ram Chandra* v. *Bhup Singh*,

L. R. 44 I. A. 126, had made a preliminary decree, which was reversed by the High Court.

L. de Gruyther, K. C. and *J. M. Parikh* for Appellant.

The respondents were not represented.

Judgment has been reserved.

II. Petitions for Special Leave to Appeal.

23rd February.—*Gayadin Singh* v. *Dhanpat Singh* (Allahabad).

The petitioner (plaintiff) having on the 23rd July 1919 sued for the recovery of 2-anna share in the estate of Thakurdin deceased, upon the death of his widow, Daryai Kunwar, the Subordinate Judge of Cawnpore made a decree in his favour, which, however, was reversed upon appeal.

A. Majid for Petitioner.

Petition dismissed.

23rd February.—*Odeyram Kishenlal* v. *Phoolchand Fatehchand* (Lahore).

On the 14th July, 1918, the petitioners sued the respondents before the Subordinate Judge, Delhi, for Rs. 62,016, damages for breach of a contract dated the 30th November 1916 for the sale by the respondents to the petitioners of 100 cases of white shirtings. The respondents pleaded, under S. 39 of the Contract Act, cancellation of the contract by the petitioners (buyers) and acquiescence therein by the sellers (respondents) which defence was accepted by both the Courts in India.

L. de Gruyther, K. C. and *W. Wallach* for Petitioners.

The petition was dismissed.

25th February.—*Debi Charan* v. *The King-Emperor* (Oudh).

The petitioner and his son (Phulchand) were tried before the Additional Sessions Judge, Kheri, and four assessors for abetting the murder of Chedanusa (petitioner's father) by three other persons on the 18th February 1924, these latter being charged with the substantive murder, and jointly tried with them. The assessors unanimously found the petitioner and his son not guilty, but the Judge, disagreeing with them, convicted and sentenced them both to transportation for life under Ss. 302 and 109, Penal Code. The petitioner and his son having appealed,

PRIVY COUNCIL.

CORAM: *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

I. Appeals.

20th February.—*Ankineedu Prasada* v. *Renduchintala Subbayya and others.* (Appeal No. 60 of 1923 from Madras.)

The question here was whether the lands from which the appellant sought to eject the respondents were Kamatan or home-farm lands, the Courts in India having held that they were not.

L. de Gruyther, K. C. and *K. V. L. Narasimham* for Appellant.

The respondents were not represented.

The appeal was dismissed.

23rd February.—*Forbes* v. *Ralli and others.* (Appeal No. 5 of 1924 from Patna).

The question for determination in this appeal is whether the respondents are entitled to hold certain leasehold property at Sultanpur as permanent tenants, or merely as yearly tenants subject to notice to quit from the appellant as executor of the will of A. J. Forbes deceased.

L. de Gruyther, K. C. and *K. Brown* for Appellant.

Sir John Simon, K.C., A. M. Dunne, K. C., and *S. Hyam* for Respondents.

The appeal is proceeding.

25th February.—*Begu and others* v. *The King-Emperor.* (Appeal No. 151 of 1924 from Lahore.)

CORAM: *Lord Haldane, Lord Dunedin* and *Sir John Edge.*

Of the five appellants, Bakhu and Walia were convicted of murder under S. 302, Penal Code, and sentenced to death Begu, Raja and Hamid were convicted under S. 201 of the Code of causing evidence of the commission of the murder to disappear with the intention of screening the offenders from legal punishment, and sentenced to 7 years' rigorous imprisonment. The prisoners, who had been all charged under S. 302 with the murder of Baksh at Tibbi Hamid Sahu on the 15th-16th June, 1923, had been jointly tried in December, 1923, before the

Sessions Judge of Montgomery and three assessors. This trial was impugned as illegal because (1) the Sessions Judge had, in breach of S. 309, Criminal Procedure Code, failed to take the opinion of the assessors as to the liability of the accused under S. 201 of the Penal Code, under which no charge had been framed; (2) Begu, Raja and Hamid had not been charged with any offence under S. 201, Penal Code, and this vitiated the convictions under that section, as well as the joint trial. The High Court at Lahore had, on the 8th April, 1924, affirmed the convictions and sentences.

W. Wallach for Appellants.

A. M. Dunne, K. C. and *K. Brown* for Respondent.

The appeal was dismissed.

II. Petitions for Special Leave to Appeal.

23rd February.—*Ramdeo Baboona* v. *Bhejraj Baboolal* (Allahabad).

The petitioner sued for Rs. 1,04,287-15-6 damages for breach of contract to return 150 bales of markin, which the respondent in September, 1917, had borrowed from the petitioner for a year in order to complete his contract with another dealer. Both the Subordinate Judge of Cawnpore and the High Court had dismissed the claim.

W. Wallach for Petitioner.

Leave granted.

23rd February.—*Adappa and others* v. *Gundappa B. Desai and another.*

Judgment has been delivered dismissing the appeal.

2nd March.—*Palaniappa Chettiar* v. *Kathiresan Chettiar.*

Judgment has been delivered allowing this appeal.

A. de M.

HIGH COURT.

Srinivasa Aiyangar, J.
17th February, 1925. } *C. S. No.* 757 *of* 1922.

Indian Contract Act, S. 23—Contract forbidden by law—Public policy—Agreement of partnership in British India for arrack business to be carried on in Mysore State—Suit for accounts

of the partnership—Illegality—Jurisdiction of British Courts to try suit—Law applicable to the case.

In a suit by the plaintiff against the defendant for accounts of partnership in arrack business carried on in Mysore Province, but the partnership agreement for which was executed in Madras,

Held, 1. Partnership between a licensee and a non-licensee is not forbidden by law ;

2. The *lex loci solutionis* is the law of Mysore which is applicable to the facts of the case. British Courts have jurisdiction to try the suit though the law of Mysore will apply ;

3. Such a partnership is not opposed to public policy of British India. It all depends on the facts of the case as to whether the licensee partner has transferred or sub-leased his right to vend to the non-licensee partner. 35 Mad. 528 and 38 M. L. J. 123 dissented from.

K. Krishnaswami Aiyangar for Plaintiff.

N. Rajagopalan, Counsel, instructed by *P. V. Sudarsana Raju* for Defendant.

T. S. Rajagopala Aiyar for Defendants 2 and 3 who did not contest.

C. A. S.

Odgers, J.
24th February, 1925. } *S. A. No.* 459 *of* 1922.

Co-owner—Mortgagee of the share of one of several co-owners of a raiyati holding—Payment of the entire rent on holding by the mortgagee to Zamindar—Whether mortgagee gets a charge on the shares of other co-owners.

Where a mortgage from one of out of three divided co-owners of a raiyati holding pays the rent on the holding to the Zamindar, he does not acquire a charge over the shares of the other co-owners of the raiyati holding.

V. Viyyanna for *G. Lakshmanna* for Appellants.

P. Somasundaram and *P. Satyanarayana* for Respondents.

C. A. S.

Kumaraswami Sastri and Krishnan, JJ.
5th March, 1925. } *A. S. No.* 324 *of* 1923.

Hindu Law—Joint family—Dedication of self-acquired properties by a Hindu father to a charity appointing his sons as

trustees hereditarily—Death of one of the sons without issue—Office of trusteeship survives to the other son—Devise by father of self-acquired property to his sons—Sons take as joint family property.

Where a father having self-acquired properties dedicated a material part of the same for charity and appointed his two sons as trustees hereditarily, *held,* that the two sons took a joint estate in the office of the trusteeship and on the death of one of them, the widow would not be entitled to be a co-trustee with the other brother.

The presumption in such cases as in the case of a devise of self-acquired properties to his sons is that they take as members of a joint family.

T. M. Krishnaswami Aiyar for Appellant.

A. Krishnaswami Aiyar for Respondent.

C. A. S.

Venkatasubba Rao and Madhavan Nair, JJ. *10th March,* 1925. — *C. M. A. No.* 71 *of* 1925.

Decree—Execution—Decree against a trustee payable out of the income and assets of the trust—Plea by trustee in execution that certain incomes are earmarked for specific purposes—Plea whether open in execution.

Where a creditor advanced moneys to the trustee of a kattalai in a temple and obtained a decree directing the payment of the amount from out of the income and the assets of the kattalai, it is not open to the trustee of the kattalai to plead in execution of the decree that certain portions of the income were earmarked for certain specific purposes in the temple and are consequently not liable for the decree.

It is not open to a judgment-debtor to go behind the decree or to question its correctness to any extent in execution of the decree. 43 M. 675, 44 C. 627, 16 L. W. 314 followed.

K. Bhashyam Aiyangar and *S. Panchapakesa Sastri* for Appellant.

C. A. Seshagiri Sastri for *K. S. Jayarama Aiyar* for Respondent.

C. A. S.

Phillips, J.
10th March, 1925. } *C. C. C. A. No.* 1 *of* 1924.

Transfer of Property Act, S. 106—*Lease for tapping toddy—If a manufacturing lease—Notice to quit.*

A lease for tapping toddy is not a manufacturing lease under S. 106, Transfer of Property Act, and does not require six months' notice to quit. Notice giving time for a month and a half was held good in this case.

K. P. Ramakrishna Aiyar for Appellant.

K. V. Ramachandra Aiyar for Respondent.

T. S. V.

Wallace, J.
12th March, 1925. } *C. M. S. A. No.* 59 *of* 1923.

Civil Procedure Code, S. 48—*Decree for possession of a moiety of a house and execution of a sale deed for the same by the judgment-debtor—Decree not a conditional one on the execution of sale deed—Execution of decree for possession after* 12 *years of the decree but within* 12 *years of the execution of the sale deed—Application for execution, barred.*

Where a decree dated 7th December, 1907 directed delivery of possession to the decree-holder of a half share of a certain house owned by the judgment-debtor and further directed the execution within one month from the passing of the decree of a sale deed in regard to the said half share, and the sale deed was executed on 6th May, 1915, *held*, that the execution petiton filed on 31st January, 1921, for delivery of possession was barred by limitation under S. 48 of the C.P. Code as delivery of possession was not in any sense conditional upon the execution of the sale deed and as the decree-holder could apply for delivery of possession immediately after the passing of the decree. Limitation would not therefore run from 6th May, 1915.

V. Govindarajachari for Appellant.

C. A. S.

Odgers, J.
13th March, 1925. } *S. A. No.* 453 *of* 1922.

Appellate Court—Powers of—Remand—Construction put on document before remand—If binding after remand—Service grants—When resumable.

An Appellate Court is not precluded from adopting a construction of document different from that of the remanding Judge, where the remand was not one under O. 41, R. 23.

When the trial Court had decreed the suit and the Appellate Court altered the nature of the suit as one based on a different cause of action and remanded the case after framing fresh issues, *held* it was not a disposal on a preliminary point and the remand order was not therefore appealable under O. 43. 10 L. W. 389 followed.

Where there is a grant burdened with service, the grant is not resumable in the absence of a finding as to wilful default. (1911) 2 M. W. N. 406 referred to.

A. Krishnaswami Aiyar and *K. Balasubramani Aiyar* for Appellant.

K. V. Krishnaswami Aiyar and *V. Sundaram Aiyar* for Respondent.

T. S. V.

The C. J., Krishnan and Odgers, JJ.
18th March, 1925.
Ref. C. No. 4 of 1924.

Husband and wife—Suit for dissolution of marriage—Adultery—Inquiry as to paternity of child born to the wife during her stay with co-respondent, foreign to the nature of the proceedings.

In a suit by the husband for the dissolution of marriage on the ground of the wife's adultery with the co-respondent with whom she went to live after the alleged adultery, an enquiry into the paternity of the child born to the wife during her stay with the co-respondent is foreign to the enquiry and the plaintiff need not prove that the co-respondent is the father of that child. The only proof that is required to be given by the plaintiff in such cases is about the adultery committed and nothing more.

K. V. Srinivasan for Plaintiff-Petitioner.

C. A. S.

PRIVY COUNCIL.

I. Petitions for Special Leave to Appeal.

CORAM: *Lord Haldane, Lord Dunedin and Lord Darling.*

6th March.—*Thakur Bhugwan Singh* v. *Khedu Singh and another* (Central Provinces).

The petitioner had brought a suit before the Subordinate Judge, Bilaspur, against the respondents for exclusive possession of a certain protected Status *thakedari* village as the certificated holder (*Khatedar*) thereof, and of a house as an appanage to the village. The trial Court and the District Court had given him exclusive possession of the village under S. 109 of the Central Provinces Land Revenue Act of 1917, but these Courts differed as to whether the house was an appanage to the village, the District Court holding that it was. The Court of the Judicial Commissioner modified the decree to one of joint possession, holding that to be all to which S. 109 entitled the petitioner. On application in India for special leave to appeal, it was held that though the value of the subject-matter may have been Rs. 10,000, yet as the petitioner had valued it in his plaint for Court-fees at Rs. 4,550, special leave must be refused.

E. B. Raikes for petitioner.

Petition granted.

6th March.—*Yenuga Kamaraju and others* v. *Venkalanka Subbayamma* (Madras).

The petitioners' suit for a declaration of their title as nearest reversioners to the property of Y. Timmanna, deceased, was decreed by the Subordinate Judge, Cocanada, but dismissed by the High Court, Madras, who however granted them special leave to appeal. Later, owing to the first petitioner being an undischarged bankrupt, and the 2nd and 3rd petitioners filing their insolvency petition and not furnishing security for the costs of the appeal, the special leave was cancelled.

W. Wallach for Petitioners.

K. V. L. Narasimham for Respondent.

Petition dismissed.

6th March.—*Udoychand Panalal* v. *P. E. Guzdar & Co.* (Bengal).

A similar question to that raised in the above petition of *Thakur Bhugwan Singh* as to the value of the subject-matter of

the suit and its valuation by the plaintiff at less than the Rs. 10,000 required by S. 110 of the Civil Procedure Code, 1908, arose in this petition.

L. de Gruyther, K. C. and *Parikh* for Petitioner.

Sir G. Lowndes, K. C. and *E. B. Raikes* for Respondent.

Judgment was reserved.

CORAM : *Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.*

6th March.—*Haveli Shah and another* v. *Charandas and others* (Baluchistan):

The petitioners' father, being partner with the first and second respondents in a contract for military transport on the Harnai—Fort Sandeman Lines, paid them certain sums against their receipt. The question now is whether this receipt was in full and final settlement of the profits due to them, as contended by the petitioner, or whether the respondents are further entitled to a share in (*a*) a sum of Rs. 1,90,000, donkey-drivers' wages subsequently paid by Government; (*b*) Rs. 3,76,351, excess income-tax refunded by Government, which further share both the District Judge, Quetta, and the Court of the Judicial Commissioner, Baluchistan, has accorded them.

Sir G. Lowndes and *A. Majid* for Petitioners.

Petition granted.

I. Appeal.

CORAM : *Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.*

7th and 10th March.—*Mir Subhan Ali* v. *Imami Begum and others* (Central Provinces Consolidated Appeals No. 102 of 1923).

The points in dispute here are (i) whether the beneficial interest in certain inam or jaghir lands, granted to a common ancestor of the parties and continued by the British Government in 1866 to the person who then held it and his male heirs in perpetuity, passes to all the heirs of the first holder according to Shiah Mahomedan Law, or is confined to his male heirs; (ii) the effect of a finding of the Judicial Commissioner's Court in Suit No. 137 of 1904 that the entry in the Inam Certificate regulated the duration of the grant, but not the enjoyment of it as between the heirs of the grantee, and that the inheritance

devolved under the ordinary Shiah Law of Inheritance by which the family was governed.

L. de Gruyther, K. C. and *J. M. Parikh* for Appellant.

Sir G. Lowndes, K. C, and *E. B. Raikes* for Respondents.

Judgment reserved.

A, de M,

HIGH COURT.

Odgers, J.
3rd March, 1925. } *S. A. No.* 358 *of* 1922.

Mahomedan Law—Co-sharers—Suit for partition—Agreement after decree to continue joint—If requires registration—Failure to execute decree—Effect of.

One of the heirs of a deceased Mahomedan sued the other heirs for his share of the estate and obtained a decree for partition. Subsequently he entered into an agreement with the other sharers to remain joint, but it was not in writing and hence not registered. *Held,* the agreement did not require writing or registration and was binding on the parties. The decree-holder's rights will not be affected by the fact that he did not execute his decree, but allowed it to be barred by time.

C. V. Anantakrishna Aiyar for Appellant.

K. V. Krishnaswami Aiyar (for the Advocate-General) and *D. A. Krishna Variar* for Respondent.

T. S. V.

Spencer and Ramesam, JJ.
6th March, 1925. } *O. S. A. No.* 87 *of* 1924.

Presidency Towns Insolvency Act, S. 11 (*d*)—"*Carrying on business*"—*What constitutes—Trading firm—Continuance till debts are paid.*

In a suit for dissolution of a family trading firm, a Receiver was appointed and he took possession. More than one year afterwards, a creditor applied to have the firm adjudicated insolvent. It was pleaded in defence that the firm did not carry on business within one year prior to the presentation of the partition and hence the jurisdiction of the Court was barred under S. 11 (*d*). *Held,* both under the English and Indian Laws, "carrying on business" must be deemed to continue so long as

debts remained unpaid even if no trade was actually carried on. The intervention of the Receiver and his management of the estate would not affect the question. Case-law discussed.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellant.

Nugent Grant instructed by *Grant* and *Greatorex* for Respondents.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ. *12th March,* 1925. — *L. P. A. No.* 58 *of* 1924.

Limitation Act, Art. 120—*Suit by Official Receiver under S.* 53, *T. P. Act—Limitation when begins to run—Election or knowledge.*

In a suit under S. 53, T. P. Act, by a Receiver in insolvency to set aside a transfer as being in fraud of creditors, the transferee pleaded that the alienation was more than 6 years old and hence the suit was barred. *Held,* the suit was governed by Art. 120 of the Limitation Act, but that the date of alienation was not necessarily the time from which limitation began to run.

Per Venkatasubba Rao, J.—The right to avoid the transfer was one open to any creditor, and hence time began to run only from the date on which he elects to avoid it.

Per Madhavan Nair, J.—Time would run from the date when the creditor had knowledge of the circumstances under which the alienation was made and which entitled him to seek to set it aside.

B. Jagannath Das for *V. Suryanarayana* for Appellant.

N. Rama Rao for Respondent.

T. S. V.

Kumaraswami Sastri, J. *12th March,* 1925. — *C. R. P. No.* 311 *of* 1924.

Madras Local Boards Act, Ss. 56 *and* 57—*Failure to attend for three consecutive months—No meeting of Board in one month—If seat vacated—Matter not reported to the next meeting of the Board—Effect.*

His Lordship referred to a Full Bench the questions (1) whether a member of a Taluq Board, who failed to attend the meetings of the Board for three consecutive months vacated his seat under S. 56 (*h*), if there was no meeting held during one of the months, and (2) when such omission was not placed

before the Board in order that it might decide whether he should be restored to his seat, a petition can be put in to the District Judge under S. 57.

T. R. Ramachandra Aiyar and *K. S. Champakesa Aiyangar* for Petitioners.

O. Thanikachalam Chetty and *S. Panchanatha Mudaliar* for Respondents.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ. *12th March*, 1925. — *L. P. A. No.* 63 *of* 1924.

Inam—Unenfranchised service inam — Court auction—Purchase subject to a mortgage—Subsequent enfranchisement—Suit for redemption—Validity of sale—If open to attack—Civil Procedure Code, S. 47.

An unenfranchised service inam was attached, sold in execution and purchased by the appellant's predecessor-in-title subject to a prior usufructuary mortgage executed by the office-holder to the respondent. The usual sale certificate was issued to the appellant. Subsequently the inam was enfranchised in favour of the office-holder and sold by him to the respondent. In a suit by the appellant for redemption, *held* the respondent's predecessor-in-title having been a party to the execution proceedings, it was not open to the respondent to raise the plea that the sale being of an unenfranchised inam was void. 28 Bom. 125 ; 40 All. 680 ; 34 Cal. 199 followed.

Per Venkatasubba Rao, J.—A plea which was not open to a plaintiff by reason of S. 47, C. P. Code, is not open to him simply because he is arrayed as a defendant. 24 Cal. 355 dissented from ; 34 Cal. 199 ; 9 C. W. N. 972 followed.

C. Rama Rao for Appellant.

K. Venkatrama Raju for Respondent.

T. S. V.

Wallace, J. *12th March*, 1925. — *C. R. P. No.* 24 *of* 1925.

Madras District Municipalities Act — Election petition—Powers of Court—Rejection of votes by returning officer—Validity of—If can be gone into.

In an election petition under the Madras District Municipalities Act, the Court can go into the question whether the decision of the returning officer rejecting or accepting certain doubtful votes was correct or not, as his decision is in no way final.

A. Krishnaswami Aiyar and *B. V. Viswanatha Aiyar* for Petitioner.

T. V. Venkatrama Aiyar and *T. V. Ramanatha Aiyar* for Respondent.

T. S. V.

Phillips, J.

13th March, 1925. } *Cr. R. C. No.* 223 *of* 1924.

Criminal Procedure Code, Ss. 488, 489 (2)—*Order for maintenance—Subsequent order of Civil Court directing restitution of conjugal rights—Effect of—If order* ipso facto *vacated—Discretion under amended section*—Bona fides *in obtaining decree.*

An order awarding maintenance under S. 488 need not necessarily be set aside on account of a subsequent decision of a Civil Court decreeing the husband restitution of conjugal rights. Although under the Code as it stood before the amendments of 1923, the correct view might be that the order was *ipso facto* vacated by the Civil Court's decree, under S. 489 as amended the Criminal Court has now the discretion to set aside or vary the original order. The fact that the decree of the Civil Court is not a *bona fide* one, but only obtained with the intention of getting rid of the order for maintenance is one of the circumstances to be considered by the Magistrate in deciding whether the order should be vacated or varied. In the exercise of his discretion, he can refuse to set it aside.

N. A. Krishna Aiyar for Petitioner.

The Public Prosecutor and *S. Muthia Mudaliar* for Respondents.

T. S. V.

Phillips and Odgers, JJ.
16*th March,* 1925. } *S. A. No.* 109 *of* 1922.

Adverse possession—Attachment—Effect of—Symbolical delivery of property when interrupts adverse possession.

A claim petition against an attachment having been dismissed, the claimant filed a suit under O. 21, R. 63, C. P. Code, for getting his title declared. The defence set up was title by adverse possession and it was found that on the date of the suit the defendant had been in adverse possession for more than 12 years, but that on the date of attachment he had not been in such possession for the requisite period of twelve years. *Held,* the attachment did not arrest the running of time so as to prevent the defendant from acquiring title by adverse possession. 11 M. L. J. 544 followed; 33 M. L. J. 316; 35 Bom. 79 referred to. The case of attachment under the Criminal Procedure Code stands on a different footing.

Per Odgers, J.—Symbolical delivery has the effect of interrupting adverse possession only if it was effected in proceedings in which the person who sets up such adverse possession was an actual party. 34 M.L.J. 47 (P.C.) followed.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellant.

S. T. Srinivasagopalachari for Respondent.

T. S. V.

Devadoss, J.
27*th March,* 1925. } *Cr. R. C. No.* 98 *of* 1925.

Criminal Procedure Code, S. 488—*Maintenance to wife and child—Award of Rs.* 300—*If* ultra vires—"*In the whole*"—*Construction of—Alimony granted by an English Court—If bars jurisdiction of Court under the section.*

An order passed by a magistrate under S. 488, Criminal Procedure Code, awarding Rs. 300 as monthly maintenance to a wife and her two children as against the husband is not *ultra vires.* The English statutes relating to maintenance have no bearing on the section. The expressions "wife or such child" and "in the whole" construed.

N R C

The existence of an order for alimony passed by an English Court does not oust the jurisdiction of a magistrate under S. 488 of the Code.

Vere Mockett for Petitioner.

The Public Prosecutor and *E. L. Thornton* for Respondents.

T. S. V.

Odgers, J.
27th March, 1925. } *S. A. No.* 1080 *of* 1922.

Easement—Prescription—If can be acquired by fluctuating body—Rule and exception—Customary easement—Plea of—Requisites.

A fluctuating body of persons cannot acquire a right of easement by prescription ; but one recognised exception to this rule is that the inhabitants of a particular locality could so acquire it.

Where in an appeal, a finding of easement arrived at by the lower Courts on the basis of a right acquired by prescription was untenable, it could not be supported on the basis of customary right. A customary right has to be specifically pleaded and the several essentials of a valid custom must be clearly established.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Appellant.

T. Krishna Kurup for Respondents.

T. S. V.

Phillips, J.
30th March, 1925. } *S. A. No. 727 of* 1922.

*Civil Procedure Code, O. 32, R. 7—Decree in favour of minor—Transfer by guardian-*ad-litem*—No leave of Court obtained—Effect.*

The guardian-*ad-litem* of a minor transferred a decree in favour of the minor to a third party, but did not obtain the leave of Court under O. 32, R. 7. A creditor of the minor who had obtained a decree against him, attached the decree in favour of the minor and the question arose in proceedings arising out of the attachment whether the transfer of the decree by the guardian-*ad-litem* was void in the absence of the Court's sanction. *Held*, the transfer was not void but only voidable; it was binding

on all parties except the minor and he alone could question it. 26 Bom. 109 ; 22 A. L. J. 521 ; 2 Pat. 538; 62 I. C. 794 folld.

G. Lakshmanna and *V. Viyyanna* for Appellants.

T. Ramachandra Rao for Respondent.

T. S. V.

The Chief Justice, Phillips and Kumaraswami Sastri, JJ.

31st March, 1925.

A. S. No. 70 *of* 1921.

Probate and Administration Act—Hindu will in the mofussal—Executor—Vesting of estate—Probate not taken out—Act if applies.

An executor appointed under a will executed by a Hindu in the mofussal has, even prior to taking probate of the will, all the powers of an executor under the Probate and Administration Act. The estate vests in the executor (who accepts office) from the date of the testator's death. Case-law discussed.

A. Krishnaswami Aiyar, A. Satyanarayana and *P. Bapiraju* for Appellants.

G. Lakshmanna, V. Suryanarayana and *V. Viyyanna* for Respondents.

T. S. V.

Kumaraswami Sastri and Krishnan, JJ.

31st March, 1925.

O. S. A. No. 102 *of* 1923.

Contract Act, S. 30*—Sale of goods—Delivery not intended—Wagering or gaming transaction.*

The plaintiff sold some bales of Japan yarn to the defendant who in turn sold them in several lots to various persons from whom the plaintiff ultimately purchased the whole lot. No goods were delivered by the plaintiff to the defendant, or by the latter to his vendees or by such vendees to the plaintiff, but only delivery orders called *pattapatties* passed. Moneys too were not paid, but only nominal orders to pay called *havla* chits. In a suit by the plaintiff for recovering the price of goods sold and delivered, the defence was that there was no actual delivery and that the transaction was a wagering one. The evidence disclosed that under certain circumstances delivery could be called

for. *Held*, reversing the decision in 45 M. L. J. 716, actual delivery was not intended and the transaction was a gaming one. The fact that in conceivable contingencies delivery might be called for would not convert a gaming transaction into a legal one. (1896) A.C. 166 ; (1899) 1 Q.B. 794 ; 24 Bom. 227 folld.

Per Kumaraswami Sastri, J.—An action for price of goods sold and delivered is not maintainable, if no goods were actually delivered. Delivery of *pattapatties* is not tantamount to delivery of goods.

A. Krishnaswami Aiyar and *T. L. Venkatrama Aiyar* for Appellants.

S. Srinivasa Aiyangar and *V. C. Gopalaratnam* for Respondent.

T. S. V.

The Chief Justice and Krishnan, J.
1st April, 1925.

A. S. No. 173 *of* 1923.

Hindu Law—Daughters succeeding to father's estate—Partition—Rights of survivorship extinguished—Death of one—Surrender by the other—Right of surrenderee to impeach alienations by deceased daughter.

Two daughters inheriting their father's estate partitioned it, extinguishing their rights of survivorship. Afterwards one of them died leaving her own heirs and the other made a surrender in favour of the next reversioner. The surrenderee sought to impeach certain alienations made by the deceased daughter. *Held*, he was not entitled to do it during the lifetime of the surviving daughter.

Quaere : Whether in the above circumstances the surrender itself is valid ? 39 Mad. 1035 ; (1914) M. W. N. 735 ; 41 Mad. 75 ; 41 M. L. J. 208 folld.; C. M. A. Nos. 322 and 323 of 1919 dissented from.

B. Satyanarayana for Appellants.

D. Appa Rao, G. Lakshmanna and *C. Rama Rao* for Respondents.

T. S. V.

PRIVY COUNCIL.

I. Appeals.

10th, 12th & 13th March.—*Forbes* v. *Ralli.* (Appeal No. 5 of 1924—Patna).

Hearing resumed (from 23rd February), and concluded, judgment being reserved.

12th March.—*Mian Ghulam Rasul Khan* v. *Secretary of State for India.* (Appeal No. 2 of 1924—Lahore).

Judgment was delivered, allowing the appeal.

13th March.—*Gajadhar Mahton* v. *Ambika Prasad Tewari and others.* (Appeal No. 17 of 1924—Allahabad).

Judgment was delivered, dismissing the appeal.

13th & 16th March.—*Harigir K. Gosavi and another* v. *Ananda B. V. B. Gosavi.* (Appeal No. 123 of 1922—Central Provinces).

CORAM : *Lord Phillimore, Lord Carson, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.*

The litigation is over the right to possession of certain lands in the Izara of Naigaon originally belonging to Ramkrishna Bharti, deceased, and after his death disposed of, partly by gift, and partly by sale, by his widow, it is alleged by the plaintiff-respondent, without legal necessity.

A. M. Dunne, K. C. and *S. Hyam* for Appellants.

Sir G. Lowndes and E. B. Raikes for Respondent.

Judgment has been reserved.

17th & 19th March.—*Aguilar* v. *K. Gangananda Singh and others.* (Appeal No. 126 of 1922—Patna).

CORAM : *Lord Phillimore, Lord Carson, Sir John Edge and Mr. Ameer Ali.*

The respondents having sued for possession of 709 bighas of alluvial land as forming part of their Mauza Rahimpur, and the appellant claiming it as part of his Mauza Mansi, the Subordinate Judge of Monghyr had passed a decree for 606 bighas, which was confirmed by the High Court on appeal.

L. de Gruyther, K. C. and *S. Hyam* for Appellant.

K. Brown for Respondents.

The appeal is proceeding.

20th & 23rd March.—*Aguilar* v. *K. Gangananda Singh and others.*

Hearing resumed and concluded, judgment being reserved.

23rd & 24th March.—*Sevak Jeranchod Bhogilal and others* v. *Dakhore Temple Committee and others.* (Appeal No. 95 of 1923—Bombay).

CORAM : *Lord Shaw, Lord Carson, Sir John Edge and Mr. Ameer Ali.*

This appeal arises out of an application by the Committee of the Hindu Temple of Shri Ranchodraiji at Dakhore to the District Judge, Ahmedabad, to confirm certain rules framed by them and sanctioned by him on the 5th December, 1914, in accordance with a scheme relating to the Temple which had been prepared by the High Court, Bombay, on the 12th September, 1906, and confirmed with slight variations by the Privy Council on the 1st May, 1912. The High Court had modified in appeal on the 11th April, and 22nd September, 1919, the rules sanctioned by the District Judge.

L. de Gruyther, K. C. and *J. M. Parikh* for Appellants.

A. M. Dunne, K. C. and *W. Wallach* for 1st Respondent.

Sir G. Lowndes, K. C. and *E. B. Raikes* for the 2nd and 3rd Respondents.

Judgment has been reserved.

24th March.—*Hope Prudhomme and Co.* v. *Hamel and Horley, Ltd.*

Judgment has been delivered, allowing the appeal.

24th March.—*Kirkwood* (alias *Ma Thein*) *and another* v. *Maung Sin and another.* (Appeal No. 87 of 1924—Lower Burma).

CORAM : *Lord Shaw, Lord Carson, Sir John Edge and Mr. Ameer Ali.*

This appeal relates to certain property and mortgages standing in the names of U Baw and Po Cho (both deceased) and Maung Sin (*see* the report of Appeal No. 81 of 1923 in

Vol. XLVIII, p. 1 of this Journal), and the questions for decision are (i) whether the arbitrators' award of the 10th June 1910 was void for certain irregularities ; (ii) whether the appellants are barred by limitation from suing to set aside the award ; (iii) whether the holding of the Chief Court of Lower Burma that certain other parties to the award are not so bound does not in effect invalidate the award *in toto.*

G. Lawrence, K. C. for Appellants.

E. B. Raikes for Respondents.

The appeal is proceeding.

II. Petitions for Special Leave to Appeal.

CORAM : *Lord Carson, Sir John Edge and Mr. Ameer Ali.*

24th March.—*Thakur Gajraj Singh* v. *Thakur Beni Madho Singh and others* (Oudh).

The petitioner prayed for leave to appeal from the decision of the Subordinate Judge, Sitapur, and the Court of the Judicial Commissioner, dismissing his action for recovery of half the property of his deceased uncle, Mannu Singh, which he claimed by virtue of both Hindu Law and family custom.

Sir G. Lowndes, K. C. and *K. V. L. Narasimham* for Petitioner.

Petition dismissed.

24th March.—*P. C. Venkata Ramanayya Pantulu* v. *S. A. Subramaniam Chetty* (Madras).

In 1921, the petitioner and Seshagiri Row sued the respondent for Rs. 7,000 and interest; and the respondent in turn sued the petitioner for Rs. 4,927 and interest, and Seshagiri Row for Rs. 3,258 and interest. The actions were consolidated, and on the 20th October, 1922, Schwabe (the then) C. J. gave judgment for the petitioner, but the Court of Appeal ordered a new trial against which order the petitioner now prayed for special leave to appeal.

A.M. Dunne, K.C. and *K. V. L. Narasimham* for Petitioner.

Petition dismissed.

A. de M.

The Chief Justice,
Krishnan and
Odgers, JJ.
18*th March*, 1925.

L. P. A. No. 57 *of* 1924.

Civil Procedure Code, S. 21—*Principle of the section, applicability of—Transference of a local area from the jurisdiction of one Court to another—Whether affects pending proceedings.*

Transference of local area from the jurisdiction of one Court to that of another under the Madras Civil Courts Act does not affect pending proceedings. The principle of S. 21 of the Civil Procedure Code applies to all proceedings whether in continuation of the same suit in a superior Court or in a wholly independent suit it being necessary that the objection to want of local jurisdiction should be taken at the earlier opportunity in the same suit in which there was the want of jurisdiction.

Judgment of *Venkatasubba Rao, J.* in 47 M. L. J. 448 affirmed.

T. M. Krishnaswami Aiyar and *K. Sankara Sastri* for Appellants.

K. Bhashyam Aiyangar and *K. Narasimha Aiyangar* for Respondents.

C. A. S.

Kumaraswami Sastri,
and Krishnan, JJ.
23*rd March*, 1925.

O. S. A. No. 111 *of* 1923.

Mortgage—Private sale by the mortgagee of the mortgaged properties under a power of sale—Absence of prior demand by the mortgagee of the mortgage money—Sale for a low price—Subsequent suit on the personal covenant for balance of mortgage amount—Whether claim legal—Applicability of the English principles—Sale whether can be set aside.

A mortgagee under a power of sale in a mortgage deed brought the mortgaged properties to sale without notice to the mortgagor demanding payment of the mortgage money and they were sold for a very low price. Subsequently the mortgagee brought a suit for balance of the mortgage amount with interest, *held*, that the suit must be dismissed.

Held also, that the sale could not be set aside.

The principle of English law under which a mortgagee who by an improper act of his, will not and cannot return the mortgaged property to the mortgagor on redemption is not entitled to bring a suit against the mortgagor on the personal covenant, is applicable to India as it is based on justice and common sense.

Advocate-General (*T. R. Venkatrama Sastri*) and *K. Narasimha Aiyar* for Appellant.

K. S. Narayana Aiyangar and *T. Pattabhirama Aiyar* for Mortgagor.

Mohanarangam Pillai and *Sankara Mudaliar* for other Respondents.

C. A. S.

Phillips, J.
26th March, 1925. } *S.A. No.* 838 *of* 1922.

Hindu Law—Widow—Reversioner—Last male owner entitled to a mortgage on certain properties—Suit by widow on the mortgage—Purchase by the widow of the properties in execution for less than the mortgage amount—Sale of the properties by widow—Suit by reversioner after widow's death to recover the properties—Whether reversioner only entitled to a mortgage interest in the properties.

Where the last male owner died entitled to a mortgage on certain properties and his widow subsequently brought a suit on a mortgage and purchased the mortgage properties in execution for less than a mortgage amount and subsequently sold the same for purposes not binding on the reversioner, in a suit by the reversioner to recover the properties from the purchaser on the ground that the sale was not binding on him, it is not open to the purchaser to set up that as the last male owner was only a mortgagee the reversioner is only entitled to the mortgage interest in the properties and not to the ownership therein.

By the suit on a mortgage and the subsequent purchase in execution by the widow she held the properties themselves for a widow's interest and consequently the reversioner is entitled to recover the properties themselves.

K. Bhashyam Aiyangar and *N. Panchanada Mudaliar* for Appellants.

C. A. Seshagiri Sastri for Respondent.

C. A. S.

Phillips and Odgers, JJ. 31*st March,* 1925. } *S. A. No.* 541 *of* 1922.

Service tenures—Purchaser of—Right to minerals—Onus.

The purchaser of a service tenure filed a suit claiming rights to the minerals in the villages forming the estate. The Courts below found from the nature of the tenure that it was a grant burdened with a condition of service. *Held,* in order to succeed in claiming mineral rights, the onus is on the plaintiff to prove that the grant expressly conveyed mineral rights to him. 45 Cal. 87 (P. C.) ; 44 Mad. 421 (P. C.) followed.

A. Krishnaswami Aiyar for Appellant.

The Government Pleader for Respondent.

T. S. V.

The Chief Justice and Krishnan, J. 1*st April,* 1925. } *O. S. A. No.* 43 *of* 1924.

Income-tax Act (*XI of* 1922), *Ss.* 27 *and* 66*—Failure to submit return—Sufficient cause—If a question of law for the purpose of S.* 66.

Where an assessee fails to submit a return of his income within the time fixed and applies under S. 27 for cancellation of the assessment on the ground that he had "sufficient cause" for his not complying with the order, the question whether he had "sufficient cause" is a question of law for the purposes of S. 66 of the Income-tax Act.

Nugent Grant and *G. Lakshmanna* for Appellant.

The Government Pleader for Respondent.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ. 1*st April,* 1925. } *C. M. A. No.* 422 *of* 1924.

Hindu Law—Debts—Joint family property in the hands of sons—If liable to meet a decree against father for mesne profits— Avyavaharika*—What is.*

Joint family property in the hands of a son is liable to be proceeded against in discharge of a decree for mesne profits obtained against the father. There is no illegality or immorality

and the debt would not be "*avyavaharika*". What would amount to *avyavaharika* discussed fully with reference to Hindu Law texts and case-law. The decree constituted a debt binding on the sons and was not in the nature of *danda* or fine.

K. V. Venkatasubramania Aiyar and *P. N. Appusami Aiyar* for Appellant.

S. Ramaswami Aiyar for Respondent.

T. S. V.

Phillips, J.
2nd April, 1925. } *S. A. No.* 1167 *of* 1922.

Malabar Law—Karnavan—Alienation—Suit by anandravans *to set aside—If maintainable.*

A karnavan executed a *kanom* in favour of a junior member and then died. The succeeding karnavan took no steps to have it set aside. 11 years and three months after the date of the *kanom* two junior members filed a suit for recovering the property. *Held,* unless the karnavan was disabled from bringing a suit, the *anandravans* could not bring the suit. 20 Mad. 129 (F. B.) ; 43 Mad. 393 ; S. A. No. 959 of 1917 followed ; 14 Mad. 101 ; 29 M. L. J. 633 distinguished.

K. P. M. Menon and *K. P. Abdulla Kutty* for Appellant.

B. Sitarama Rao and *P. Govinda Menon* for Respondent.

T. S. V.

Phillips and Odgers, JJ.
2nd April, 1925. } *C. C. C. A. No.* 67 *of* 1922.

Indian Easements Act, S. 15—*Acquisition of easement by prescription—Right of ownership set up by a person found against —Whether he could acquire by such user, an easement.*

Their Lordships referred to a Full Bench the question whether when a person who claimed ownership to a certain land and house, but whose title was found against, could acquire a right of easement in the land, by long continuous user, for the statutory period under S. 15 of the Indian Easements Act, whether I. L. R. 38 M. 1 is good law, after (1915) A. C. 599.

Phillips, J. holding that an easement right can be acquired.

Odgers, J. holding contra.

S. *Duraiswami Aiyar* and *A. Raghunatha Rao* for Appellants.

P. Satyanarayana for Respondent.

C. A. S.

Kumaraswami Sastri and Krishnan, JJ. *3rd April,* 1925. — *O. S. A. No.* 38 *of* 1924.

Hindu Law—Joint family—Bequest to father and sons—Nature of estate conferred—Property if necessary for the existence of joint family.

It is not necessary for the existence of a joint Hindu family that it should possess any moveable or immoveable property.

A Hindu by his will made a bequest of certain properties to his brother X and his sons. At that time X and his sons constituted a joint Hindu family. *Held,* in the absence of anything to indicate that the donees were intended to be given the property as joint family property, they took only as tenants-in-common.

Per Kumaraswami Sastri, J.—The presumption of law laid down by the trend of decisions in Madras that a gift by a Hindu father to his sons makes the property ancestral in their hands does not apply to gifts to strangers who are not in the direct line of succession to the donor. The mere fact that the donees formed a joint Hindu family did not affect the question.

Per Krishnan, J.—If all the donees were members of an undivided Hindu family, there was nothing to prevent a bequest to them all from operating as creating a joint tenancy.

Case-law discussed.

A. Krishnaswami Aiyar, K. Rajah Aiyar and *K. G. Srinivasa Aiyar* for Appellants.

K. Krishnamachari and K. M. Bhashyam Aiyangar for Respondents.

T. S. V.

Venkatasubba Rao and *Madhavan Nair, JJ.* 3rd *April*, 1925. } *L. P. A. No.* 35 *of* 1924.

Limitation Act, Arts. 115, 116—*Limited Company—Shareholder—Suit for arrears of dividend.*

Their Lordships referred to a Full Bench the question whether a suit by a shareholder for arrears of dividend is governed by Art. 115 or 116 as held in 42 Mad. 33 or which other article applied to the case

K. N. Rajagopala Sastri for Appellant.

P. Satyanarayana Rao for Respondent.

T. S. V.

Phillips, J. 6*th April,* 1925. } *S. A. No.* 1163 *of* 1922.

Limitation Act, Art. 177—*Death of respondent—Time for bringing on record legal representative—If six months' period cut down to three months—Act XXVI of* 1920—*Effect of.*

Act XXVI of 1920 has not introduced any alteration in Art. 177 of the Limitation Act, and the period allowed by law to bring on record the legal representative of a deceased respondent is six months and not three months. 4 Lahore 367 ; 1925 All. 77 followed ; 1923 Bom. 299 ; 50 Cal. 549 dissented from.

T. M. Krishnaswami Aiyar and *A. V. Viswanatha Sastri* for Appellants.

K. Bhashyam Aiyangar, V. C. Veeraraghavachariar, M. S. Venkatrama Aiyar and *P. S. Narayanaswami Aiyar* for Respondents.

[But now Act XI of 1923 has made it 90 days.—*Rep.*]

T. S. V.

Kumaraswami Sastri and *Krishnan, JJ.* 6*th April,* 1925. } *S. R. No.* 5433 *of* 1925.

Civil Procedure Code, O. 41, *R.* 22—*Applicability—Original Side Appeals—Memorandum of cross-objections—If can be filed.*

Their Lordships referred to a Full Bench the question whether it is competent to a respondent in an Original Side

Appeal to file a memorandum of objections to the decree which has been appealed against.

V. Radhakrishnayya for Petitioner.

G. Krishnaswami Aiyar and *A. Doraiswami Aiyar* for Respondents.

T. S. V.

Madhavan Nair, J.
8th April, 1925. } *C. M. S. A. No.* 3 *of* 1924.

Limitation Act, Ss. 14, 19—*Suit to declare mortgage not binding—Decree declaring it to be binding in part and allowing mortgagor to pay the amount and get possession—Subsequent suit by mortgagee for amount under decree—Recitals in plaint—If amount to acknowledgment— Pendency of mortgagee's suit—Period if can be deducted.*

In a suit by the junior members of a Malabar tarwad to have their Karnavan removed and to recover possession of a property mortgaged by him after declaring the mortgage not binding, the Court declared the mortgage binding only in part and further decreed that on depositing that amount in Court, the mortgagee was to give possession. Within three years of the decree the mortgagee filed a suit to recover the money found due to him under the mortgage and in the plaint stated that under the prior decree he had been decreed that amount only and claimed the same. In an execution application filed by the mortgagor to recover possession after depositing the amount found due, he claimed that the recitals in the plaint filed by the mortgagee amounted to an acknowledgment of liability. *Held* (1) the recitals were mere statements of fact and incidental references to the decree and did not fall under S. 19. 25 Cal. 844 (P.C.) ; 33 Cal. 1047 (P. C.) ; 38 Bom. 47 ; 46 M. L. J. 1 referred to ; 45 Mad. 443 and 17 L. W. 674 followed; (2) the time spent in defending the suit filed by the mortgagee could not be deducted as the mortgagor could not have got therein the relief he claimed in the execution application. 43 Cal. 660 (P. C.) ; 44 M. L. J. 179 distinguished.

T. S. Viswanatha Aiyar for Appellant.

C. V. Anantakrishna Aiyar for Respondent.

T. S. V.

Krishnan, J.

8th April, 1925. } *C. R. P. No.* 22 *of* 1925.

Madras Civil Rules of Practice, Appendix A—Schedule of process fees—Warrant of arrest—Emergent order—Fee payable—Additional fee.

Under the Madras Civil Rules of Practice, Appendix A, Schedule of Process-fees, a fixed fee is payable for every warrant taken out against the judgment-debtor for arrest, attachment, etc., with an additional fee for the services of the *amin* or process server for each day after the third day beginning with the day on which the warrant is issued. Note 2 to the Appendix states " For processes applied for and ordered to be executed as emergent, the fee will be the ordinary fee and half as much again." *Held,* the extra fee provided for by Note 2 applies equally to the additional fee payable for the services of the *amin* or process server.

G. Lakshmanna for Petitioner.

The Government Pleader argued *contra.*

T. S. V.

Ramesam, J.

8th April, 1925. } *C. R. P. No.* 148 *of* 1923.

Civil Procedure Code (*V of* 1908), *O.* 9, *R.* 13—*Indian Limitation Act* (*IX of* 1908), *Art.* 164—Ex parte *decree—Application to set aside more than a year from the date of decree—Two summonses affixed and decree made* ex parte—*Knowledge of decree within* 30 *days of application not brought home to the petitioner—Knowledge of pendency of suit—If sufficient—Actual ignorance of date of hearing though service declared sufficient—Whether 'sufficient cause' for non-appearance—Affixture after two attempts—If advisable—Attitude of Courts in dealing with applications to set aside* ex parte *decrees—What should be—Defence on the merits weak—Whether a ground justifying refusal to set aside an* ex parte *decree.*

Where in a suit, two notices were taken out to the two defendants and both of them were merely affixed and there was no personal service and the second defendant's properties were attached before judgment and an *ex parte* decree was obtained against both the defendants in execution of which the 1st

defendant was arrested more than a year after the date of the decree when he presented an application to have the *ex parte* decree set aside which was rejected by the first Court (District Munsif) on the ground that though there was no personal service the 1st defendant must apparently have been aware of the decree and its partial adjustment by the 2nd defendant as a copy of the mortgage referring to the adjustment was produced by the 1st defendant into Court along with his application and that the 1st defendant's defence on the merits was weak and on appeal the District Judge confirmed the Munsif's order on the ground that he could not believe that the 1st defendant had no knowledge of the *suit* until more than a year after the decree, in revision.

Held (*i*) that the Courts below had not correctly appreciated the points they had to decide before they could dispose of the application to have the *ex parte* decree set aside ;

(*ii*) that the nature of the defence on the merits was irrelevant to the disposal of the application;

(*iii*) that in all suits at least three attempts should be made before service by affixture is resorted to as is the practice in the High Court and that mofussil Courts should in future keep this in mind ;

(*iv*) that what is required by Art. 164 of the Limitation Act, 1908, is knowledge of the defendant that a particular decree had been passed against him in a particular Court for a particular sum and in favour of a particular person and not merely the knowledge that some suit is pending against him. I. L. R. 47 Bom. 485 followed ;

(*v*) that though service by affixture may be good or valid service, if, as a matter of fact, the defendant had no knowledge of the hearing of the suit and consequently did not appear, it would be "sufficient cause which prevented him from appearing" such as would entitle him to have the *ex parte* decree set aside. I. L. R. 29 Mad. 134 followed. (1913) M. W. N. 1028 ; 21 Mad. 324 and 419; 13 I. C. 127 ; 26 M. L. J. 368; 1 L.W. 351; 76 I. C. 60 ; 21 M. L. J. 978 and 42 M. L. J. 422 referred to and considered ;

(*vi*) that Courts should, as far as possible, enable an *ex parte* defendant to have his defence heard, if he subsequently turns up and applies to be heard. I. L. R. 46 Mad. 60 and 17 L. W. 627 followed ; and

(*vii*) that the *ex parte* decree in this case must be set aside and the suit must be disposed of on the merits.

Watrap S. Subramania Aiyar (with him *A. S. Srinivasa Aiyar*) for Petitioner.

A. C. Shanmuga Nainar for *S. Muthia Mudaliar* for Respondent.

W. S. S.

Phillips, J.
9th April, 1925. } *S. A. No.* 1493 *of* 1922.

Transfer of Property Act, S. 101—*Redeeming prior mortgage—Subrogation—Keeping alive—Presumption—Intention—Question of fact.*

Where a person who purchases property pays off a mortgage already subsisting over the property and claims rights of subrogation, Courts will readily start with a presumption in his favour that his intention was to keep the mortgage alive in his favour. 10 Cal. 1035 (P.C.) followed. It is always a question of fact in each case to be decided on the evidence whether the intention to keep the mortgage alive was present. 9 Cal. 961 (P. C.) ; 21 M. L. J. 181 ; 34 Mad. 119 referred to.

A. Narasimhachariar for Appellant.

K. Kuttikrishna Menon for Respondent.

T. S. V.

Phillips, J.
9th April, 1925. } *S. A. No.* 1494 *of* 1922.

Malabar Law—Tarwad—Extinction of—Inheritance to property—Conflicting views regarding.

With regard to the rules of succession to the property of an extinct *tavazhi* there is a conflict of judicial opinion ; one view is that the properties go by propinquity to the heir of the last surviving member ; another view is that the properties go to the branch which separated off last from the main tarwad; while the third view is that propinquity by itself does not determine succession but a combination of both the above sets of factors. His Lordship did not express his own view as to which was correct, as on the particular facts of the case the appellant was not entitled to succeed whichever view be taken as correct.

38 Mad. 48 ; 6 M. H. C. R. 411 ; 17 Travancore Reports 69 ; 21 L. W. 215 referred to.

K. Kuttikrishna Menon for Appellant.

C. V. Anantakrishna Aiyar for Respondent.

T. S. V.

Srinivasa Aiyangar, J.
14*th April,* 1925. } *C. R. P. No.* 426 *of* 1923.

Civil Procedure Code, O. 20, *R.* 4 (1)—*Judgment of Small Cause Court—Issues set out—Judgment stating " I find all issues for plaintiff "—Validity of.*

In a Small Cause suit for refund of moneys paid as advance, alleging breach of contract on the part of the defendants, three issues were set out in the judgment as arising in the case, relating to delivery of goods, as to who committed breach of contract and whether the defendants were partners. The judgment then proceeded by stating " I find all the issues for the plaintiffs." *Held* it did not comply with the requirements of O. 20, R. 4 (1). 42 M. L. J. 583 distd.

K. P. Ramakrishna Aiyar for Petitioners.

T. S. Viswanatha Aiyar for Respondents.

T. S. V.

Odgers, J.
14*th April,* 1925. } *S. A. No.* 336 *of* 1920.

Res judicata—*Plea of*—Mala fide *addition of unsustainable claims—Effect of.*

The plea of *res judicata* cannot be avoided by the *mala fide* addition of unsustainable claims and by bringing the suit thus framed in a Court of higher jurisdiction. 21 M. L. J. 154 followed.

A suit for annuity claiming a charge was brought in a Munsif's Court and it failed. Subsequently another suit was instituted in the Sub-Court for arrears of annuity of more years claiming also interest thereon. *Held,* the claim for interest was an unsustainable claim and the decision of the Munsif was *res judicata.*

T. R. Ramachandra Aiyar and *S. R. Muthuswami Aiyar* for Appellants.

K. Rajah Aiyar and *C. A. Seshagiri Sastri* for Respondent.

T. S. V.

Srinivasa Aiyangar, J.
14*th April,* 1925.
C. R. P. No. 452 *of* 1923.

Principal and agent—Purchase of goods by latter—Suit for price—Plea of discharge and absence of privity—If open to principal—Remedy.

Where a person had authorised his agent to purchase articles for his use and when the vendor sued him for the price pleaded that there was no privity of contract between him and the vendor and that he had already paid the price to his agent, *held*, the pleas were not sustainable in law. The principal's remedy will be against his agent for failing to pay the amount given to him.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Petitioner.

A. C. Shanmuga Nainar for *S. Muthia Mudaliar* for Respondent.

T. S. V.

Phillips, J.
15*th April,* 1925.
S. A. No. 1489 *of* 1922.

Hindu Law—Will—Joint tenancy—Creation of estate—If unknown to Hindu Law.

The statement in 23 Cal. 670 (P. C.) that joint tenancy is unknown to Hindu Law except in the case of a co-parcenary treated as a broad statement of law is not strictly accurate. In view of the decision in 11 Cal. 1 (P. C.) and 25 Mad. 678 (P. C.), the statement in 23 Cal. 670 must only be read as applicable to the particular facts of that case.

A Hindu by his will gave properties to his wife and daughter with absolute rights. On a construction of the will and from the surrounding circumstances the Lower Appellate Court held that the intention of the testator was that the donees should take as joint tenants. *Held*, the conclusion was not contrary to law and could not be interfered with in Second Appeal.

N. Rajagopalachari for Appellant.

K. G. Srinivasa Aiyar for Respondent.

T. S. V.

Phillips, J.
16th April, 1925. } *S. A. No.* 1454 *of* 1922.

Madras Estates Land Act, S. 3—*Inam—Suit in ejectment—Plea of permanent occupancy rights—Onus of proof—When on plaintiff and when on tenant—Presumption as to grant.*

In a suit in ejectment from lands granted in *inam,* where the defendants tenants set up permanent occupancy rights in themselves, there is no presumption that the grant to the plaintiff was of both warams. It is for the plaintiff to prove that the grant included both warams and hence that he was entitled to sue in ejectment. The onus would be on the tenant only when it is found or admitted that the grant to the landlord was of both warams and that the tenant was let into possession by him. 43 Mad. 166, 567 ; 45 Mad. 586 ; 47 Mad. 337 considered.

C. S. Venkatachariar for Appellants.

A. V. Viswanatha Sastri for Respondents.

T. S. V.

Phillips, J.
17th April, 1925. } *S. A. No.* 1413 *of* 1922.

Civil Procedure Code, S. 11—*Cross suits—Joint trial—Common judgment—Appeal from decree in one only—If barred by decree in the other.*

Where two cross-suits are tried together and a common judgment is delivered, but the decree in one alone is appealed from, but not in the other, the decision in the latter does not operate as *res judicata* so as to bar the trial of the appeal. The decision of the Full Bench in 29 Mad. 333 has not been overruled by the ruling of the Privy Council in 46 Mad. 895; S. A. No. 1643 of 1921 ; 46 M. L. J. (Notes of Recent Cases) 82 followed.

T. L. Venkatrama Aiyar for Appellants.

K. V. Sesha Aiyangar for Respondent.

T. S. V.

Kumaraswami Sastri and Krishnan, JJ. *6th April,* 1925. S. *R. No.* 5433 *of* 1925 and S. *R. No.* 7519 *of* 1925.

Practice—Appeal from the Original Side of the Madras High Court—Whether respondent can file a memorandum of cross-objections.

Their Lordships referred the following question to the Full Bench :—

Whether a memorandum of objections can be filed by a respondent in an Original Side Appeal.

48 M. L. J. 384 dissented from.

V. Radhakrishnayya for Petitioner in S. R. No. 5433 of 1925.

K. S. Narayana Aiyangar instructed by *Messrs. Grant and Greatorex* for Petitioner in S. R. No. 7519 of 1925.

C. A. S.

Devadoss and Wallace, JJ. 16*th April,* 1925. *S. R. No.* 1226 *of* 1925.

Limitation Act, S. 12 (2)—*Leave to appeal to His Majesty in Council—Time for obtaining copies—Deduction of—"Decree appealed from"—Meaning of.*

In computing the period of limitation for filing an application for leave to appeal to His Majesty in Council, the time required for obtaining copies of the judgment can be deducted under S. 12 (2), Limitation Act. The meaning of the expression " decree appealed from " explained. 1 Pat. 429 and 15 Mad. 169 referred to.

The Advocate-General and *K. S. Sankara Aiyar* for Petitioners.

K. Gopalaratnam for Respondent.

T. S. V.

Waller, J. 20*th April,* 1925. *C. S. No.* 551 *of* 1924.

Madras District Municipalities Act (*V of* 1920), *S.* 93 *and Sch. IV, R.* 18—*Professional tax—Carrying on business as agent —Principal office outside Municipality—Liability to tax.*

N R C

Messrs, Parry and Co. were carrying on business within the Mangalore Municipality, but their principal office was at Madras. The Mangalore Municipality levied professional tax on them for the years 1921—1923 and in respect of the same Parry and Co. sued for refund on the ground that the same was not leviable as the right of the Municipality under the Act of 1920 was restricted to cases where the principal office was within the Municipality.

Held (1) though S. 93 and Sch. IV, R. 18 were enacted in order to get rid of the effect of the decisions in 17 Mad. 453 ; 24 Mad. 205, and 29 Mad. 329 and the intention of the Legislature was clear, the same has not been carried out ;

(2) Sch. IV, R. 18 must be read as restricting the wide words of S. 93 ;

(3) The plaintiff was not liable to pay professional tax and the matter was one for the Legislature to remedy.

R. N. Aiyangar instructed by *Messrs. King and Partridge* for Plaintiff.

K. Y. Adiga and *K. Sundara Rao* for Defendant.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ.
20th April, 1925.

C. M. A. No. 46 *of* 1925.

Civil Procedure Code, S. 145, *O.* 20, *R.* 11 (2) *and O.* 34, *R.* 14—*Money decree—Property attached—Security bond executed —Stay of execution—Insolvency of debtor—Remedy of decree-holder—Suit or execution—Provincial Insolvency Act* (*V of* 1920), *S.* 52—*Applicability.*

A money decree-holder attached the properties of his judgment-debtor whereupon the latter executed on behalf of himself and his sons a security bond agreeing to pay the decree debt together with interest at an enhanced rate and the bond was to remain outstanding till the decree was fully satisfied. Under O. 20, R. 11 (2) execution was stopped for the time being, the above agreement being recorded by Court. Subsequently the debtor became insolvent and the decree-holder proceeded to enforce the bond by selling the properties in execution of the decree. The Official Receiver claimed to stop the sale.

Held (1) the bond was realisable in execution and no suit was necessary ;

(2) O. 34, R. 14 did not apply, and no separate suit was necessary ;

(3) S. 52 of the Provincial Insolvency Act (V of 1920) did not apply to mortgage decrees or to money decrees followed by a security given by the judgment-debtor to the decree-holder but only to money decrees *simpliciter.*

Case-law discussed.

T. M. Krishnaswami Aiyar and *S. Panchapakesa Sastri* for Appellant.

S. Varadachari and *A. Ganesa Aiyar* for Respondent.

T. S. V.

Ramesam, J.
22nd April, 1925. } *C. R. P. No.* 1027 *of* 1923.

Provincial Insolvency Act (V of 1920), *Ss.* 4, 27 *and* 75—*Application before Act came into force—Adjudication after—Order directing insolvent to apply for discharge within one year—If* ultra vires—*Vested right or rule of procedure—Creditors if necessary parties to application for annulment—Revision or second appeal.*

A few weeks before the Provincial Insolvency Act (V of 1920) came into force, a person applied to be adjudicated insolvent, but his petition was disposed off only after the Act came into force. He was adjudicated insolvent, but the Court acting under S. 27 of the Act (corresponding to which there was no provision under the old Act III of 1907) directed him to apply for discharge within one year. As he failed to do so, one creditor applied to the Court under S. 43 to annul the adjudication, whereupon the insolvent contended that the petition having been filed under the old Act, the Court could not apply S. 27 of the new Act to his case and that the condition was *ultra vires.*

Held (1) the matter was one relating to procedure only and as the insolvent had no vested right to be adjudicated insolvent without being subject to any conditions such as the one imposed on him the new Act applied to the case. 18 L. W. 836 followed ; 44 Cal. 535 (P. C.) ; 19 C. L. J. 83 ; 46 Bom. 757 ; 41 M. L. J. 126 , 44 M. L. J. 1303 referred to ; and

(2) it was not necessary that all the creditors should be parties to an application to annul the adjudication, especially when there was nothing to show their interests were prejudiced. 13 B. L. R. Appx. 25 distd.

Obiter : When the order annulling the adjudication was confirmed in appeal by the District Judge, the insolvent's remedy under S. 75 (1), proviso 2 read along with S. 4 (1) was by way of second appeal to the High Court and not by way of revision, as the order of annulment falls within the expression " of any nature whatsoever " in S. 4 (1).

N. A. Krishna Aiyar for Petitioner.

T. S. Viswanatha Aiyar for Respondent.

T. S. V.

Odgers, J.
23rd April, 1925. } *C. R. P. No.* 847 *of* 1924.

Civil Procedure Code, O. 22, *R.* 5—*Dispute as to who is legal representative—Intermeddler with estate appointed—If valid.*

Where there was dispute between two persons as to who was the legal representative of the deceased defendant in a suit, and the Munsif brought on record one of them as legal representative on the ground that he had intermeddled with the estate under S. 2 (11), Civil Procedure Code

Held, the order was unsustainable and the Munsif ought to have determined as to who was the legal representative on evidence taken. 21 L. W. 21 followed.

K. P. Ramakrishna Aiyar for Petitioner.

S. Ranganadha Aiyar and *A. V. K. Krishna Menon* for Respondents.

T. S. V.

PRIVY COUNCIL.

2nd April, 1925.—*Vaithialinga Mudaliar* v. *Srirangath Anni.*

Judgment was delivered, dismissing the appeals.

3rd, 6th and 7th April—*Mst. Bhagwani Kunwar* v. *Mohan Singh* (Appeal No. 94 of 1923, Allahabad).

CORAM : *Lord Atkinson, Lord Carson* and *Sir John Edge.*

The main questions here are whether (*a*) the appellant's father, Gulab Singh, who died on the 2nd December, 1886, was joint or separate from the plaintiffs (respondents) at the time of his death ; (*b*) his widow has been in adverse possession of his properties for more than 12 years. The Subordinate Judge, Cawnpore, dismissed the plaintiffs' suit for possession, but the High Court, Allahabad, allowed it.

L. de Gruyther, K. C. and *J. M. Parikh* for Appellants.

Sir G. Lowndes, K. C. and *W. Wallach* for Respondents.

Judgment reserved.

3rd April.—*Diwan Chand Kirpa Ram & Co.* v. *Weld & Co.*

Judgment was delivered allowing the appeal.

Forbes v. *Ralli and others.*

Judgment was delivered, dismissing the appeal.

6th April.—*Mahan Singh and Kartar Singh* v. *King-Emperor.*

CORAM : *Lord Atkinson, Lord Carson,* and *Sir John Edge.*

The petitioners were, on the 27th June, 1924, convicted by the Sessions Judge, Lyallpur, and assessors, of the murder, on the 20th February, 1924, of one Lahora Singh, the assessors recording a finding that—

" the deceased was killed by the two prisoners, but when they went out in his pursuit, they had no intention to kill, but intended to cause very severe and grievous hurt which they did not know to be likely to cause death, nor did they consider the hurt caused to be so imminently dangerous as to be likely to cause death. Thus, the prisoners are guilty of grievous hurt alone " ;

from which the Judge differed, holding them guilty of murder, and sentencing them to death, which conviction and sentence were affirmed on appeal by the High Court at Lahore. The

petitioners now sought special leave to appeal on the grounds that (*a*) the trial Juge was wrong in overruling the finding of the assessors ; (*b*) though the evidence showed that the petitioners assaulted the deceased, there was no evidence to show by whom the death was actually caused.

G. D. MacNair for Petitioners.

A. M. Talbot for Respondent (Secy. of State.)

Petition dismissed.

HIGH COURT.

Odgers, J.

26th March, 1925. } *S. A. No.* 1079 *of* 1922.

Negotiable Instruments—Bearer pro-note — Assignment of debt—Suit by a assignee—If lies—Admissibility of, in evidence—Claim on original cause of action.

A bearer promissory note was executed by a Mahomedan in discharge of a debt due by his father. In settlement of accounts thereunder another bearer note was subsequently executed and the debt under the last note was assigned to the plaintiff. In a suit by the assignee

Held (1) though the bearer pro-note could not be sued on, it was still admissible in evidence ;

(2) as the pro-note was only executed in settlement of the debt under a prior bearer pro-note, there was no original cause of action to fall back upon ;

(3) where the pro-note and the debt are contemporaneous, if the note could not be sued upon, no action can be maintained on the debt.

10 Mad. 94 ; 38 Mad. 660 followed ; 34 I. C. 417 not followed.

K. Jagannatha Aiyar for Appellant.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Respondent.

T. S. V.

Krishnan, J.

8th April, 1925. } *C. R. P. No.* 290 *of* 1924.

Madras Local Boards Act—Election as member of Taluq Board—Confusion at polling booth—Election declared void—High Court's interference under S. 115 *of the Civil Procedure Code.*

The election of a member of a Taluq Board was declared void by the Sub-Judge chiefly on the ground that after 4-15 P.M. there had been confusion at the polling booth and ballot papers were not supplied to the voters quickly. It was also held that secrecy of the ballot was not observed.

Held, in the absence of *mala fides* on the part of the polling officer, there is no sufficient ground for declaring the election void under Rule 9 of the Election Rules.

Held also, that the charge that no secrecy of the ballot was observed is so vague that it cannot be sustained.

Held also, the High Court will interfere when the election is declared invalid on such flimsy grounds.

P. V. Rangaram for Petitioner.

P. Somasundaram for Respondent.

C. A. S.

Spencer and Ramesam, JJ.
20th April, 1925. } *A. S. No.* 393 *of* 1922.

Mortgage—Usufructuary mortgage—Commencing after expiry of prior lease—Whether redeemable in the interval—Covenant to pay—Registration in a different area by including a small plot—Tests—Not intended to pass any interest.

During the subsistence of a lease for a term of years a usufructuary mortgage was executed by the lessor in favour of the lessee to commence after the expiry of the prior lease. The documents provided for interest and therein it was stated that interest and principal were payable. It also provided that the mortgagee should continue in possession of the lands after the expiry of the prior lease till the whole debt might be discharged by the usufruct of the lands.

The lease and one of the mortgage deeds were registered in a registration district far away from the place where the lands are situated by including a plot of 20 cents of land within the jurisdiction of that district.

Held, whatever might be the rights of the mortgagee to get his debt discharged from the usufruct after the expiry of the lease, the mortgagor could redeem by paying off the debt in the interval.

44 All. 185 followed. 35 M.L.J. 287, 36 All. 195, 16 Mad. 486, 27 M. L. J. 295 referred to.

Held also the clause providing for payment of principal and interest might be construed as a covenant to pay, 10 I. C. 272 (P. C.) followed.

Held, if it was proved that the small plot was included to give jurisdiction to a Sub-Registrar the transaction was void being a fraud on the registration law. Even if the property was owned by the mortgagor the result would be the same. 43 Mad. 436 followed, 48 Cal. 509 and 41 Cal. 972 (P. C.) referred to.

The intention can more easily be gathered in the case of a lease or a sale, though different consideration may arise in the case of a mortgage.

The Advocate-General and *A. Lakshmayya* for Appellants.

A. Krishnasawmi Aiyar and *P. V. Rangaram* for Respondents.

C. A. S.

Devadoss, J.
23rd April, 1925. } *S. A. No.* 1638 *of* 1922.

Limitation Act, Art. 116—*Covenant for title—Breach of—Suit for damages—Sale deed silent—Statutory covenant if part of sale deed—T. P. Act, S.* 55 (*2-b*).

The vendee under a registered sale deed was put in possession of only a moiety of the properties sold to him, while as regards the rest a stranger claimed to be the owner by title paramount. The sale deed was silent as to title, but contained a recital that the vendor had not created any encumbrances over the same. The vendee sued for damages for breach of the statutory covenant of title under S. 55 (*2-b*) of the Transfer of Property Act. *Held* (1) the statutory covenant under S. 55 attached itself to the sale and therefore the period of limitation for the suit was 6 years under Art. 116 of the Limitation Act. 38 Mad. 1171 followed; 35 Mad. 39 dissented from;

(2) the recital in the sale deed that the vendor had not created any encumbrances did not exclude the statutory covenant for title.

N. S. Rangaswami Aiyangar for Appellant.

M. Patanjali Sastri for Respondents.

T. S. V.

Phillips, J.
23rd April, 1925. } *S. A. No.* 1234 *of* 1923.

Transfer of Property Act, S. 51—*Applicability—Tenant in possession—Value of improvements—What tenant should prove.*

S. 51, T. P. Act, does not entitle a tenant in possession to claim the value of improvements made by him, when he merely believes that he would become the owner of the properties at a future time. To bring the case under the equitable principle laid down in *Ramsden* v. *Dyson* it is essential to prove not only that the improvements were made with the knowledge and consent of the landlord but also that the landlord led him to believe that he would have a higher right in the properties than that of a lessee.

R. Gopalaswami Aiyangar for Appellants.

N. S. Srinivasa Aiyar for *S. Satyamurthi* for Respondents.

Devadoss, J.
24th April, 1925. } *Cr. Rev. C. No.* 81 *of* 1925.

Criminal Procedure Code, S. 235—*Applicability—Act constituting offence under* S. 54, *District Municipalities Act and* S. 499, *Penal Code—Conviction for both—Validity of—Defamatory words in Telugu—Charge if to contain actual words used.*

In respect of statements made in a speech by the accused against a Municipal councillor that he took bribes, etc., he was convicted at the same trial on the same facts for an offence under S. 54, District Municipalities Act, and for an offence under S. 499, I.P.C. On objection being taken that the two convictions on the same set of facts were not sustainable at law, *held* as the statements constituted offences under two different acts, S. 235, Cr. P. Code, was not applicable and the convictions were both sustainable.

The old English rule of pleading that in an action for defamation the actual words complained of should be set out in the indictment is not strictly in vogue now and the omission to set out in the charge the actual Telugu words used but only the correct English translation thereof did not vitiate the trial, especially if the accused is not shown to have been prejudiced thereby.

B. Satyanarayana for Petitioner.

Sir K. V. Reddy and *P. Venkataramana Rao* for Respondents.

T. S. V.

Phillips, J.
24th April, 1925. } *S. A. No.* 1524 *of* 1922.

Malabar Law—Lease by Kovilagom—If enures for 12 *years —Deed— Construction—Alientión by* stani—*When valid.*

Where a lease was granted by a Kovilagom in favour of a tenant without fixing any period, but contained a provision that if the tenant left the rent in arrears, he should pay the same and surrender the property without claiming the right to hold the property for 12 years.

Held that the lease must be deemed to be one for 12 years both on the construction of the deed and on the presumption that *Kovi'agom* leases enure for 12 years,

Where a *stani* granted a *melcharth* before the expiry of the prior 12 years' period, it cannot be held to be binding on his successor unless it is shown to be for necessity. (1917) M. W. N. 707; 36 M. L. J. 103 Referred to.

K. Krishna Menon for Appellant.

K. P. Ramakrishna Aiyar and *T. S. Anantarama Aiyar* for Respondents.

T. S. V.

Spencer, J.
27th April, 1925. } *C. R. P. No.* 944 *of* 1924.

Civil Procedure Code, S. 47 *and O.* 9, *R.* 13—Ex parte *decree—No application to set aside—Execution — Objection to jurisdiction of Court—If entertainable.*

An *ex parte* decree was passed in a suit for rent under the Estates Land Act. The tenants instead of applying under O. 9, R. 13 to have the decree set aside, raised in execution proceedings an objection that the Revenue Court in which the suit was laid had no jurisdiction at all as the lands were not part of an estate within the meaning of the Estates Land Act. *Held,* the objection was not a matter relating to the execution, discharge or satisfaction of a decree and as such was not entertainable in execution 43 Mad. 678 ; 44 Cal. 627 ; 32 Cal. 296 referred to.

N. S. Rangasami Aiyangar and *S. Rangaswami* for Petitioner.

K. S. Sankara Aiyar for Respondent.

T. S. V.

Odgers and Madhavan Nair, JJ.
27th April, 1925. } *C. R. P. No.* 165 *of* 1923.

Madras District Municipalities Act (*V of* 1920), *Sch. IV, R.* 37, *Municipal Council—Resolution* re *national education—Government order prohibiting expenditure of municipal funds—Non-recognised schools—Surcharge — Liability of Chairman—Refusal of District Judge to interfere—Writ of certiorari—If lies —Government order signed by Secretary in the Ministary of Local Self-Government—Validity of—If an order of the Governor-in-Council.*

A Municipality passed a resolution introducing a system of national education in all the schools under its management. About the same time a Government order was issued prohibiting the expenditure of municipal funds on schools not recognised by Government. This order purported to be signed by the Secretary to the Ministry of Local Self-Government. The Chairman spent moneys in giving effect to the Resolution of the Council and in respect thereof a surcharge certificate was issued by the Local Fund Auditor, and the Chairman was made liable. *Held,* (1) the control of the Government in the matter of recognitions remained intact and the effect of the G. O. was an implied withdrawal of recognition ; (2) the expenditure on the schools thereafter was illegal ; (3) the fact that the order was issued by the Secretary to the Ministry of Local Self-Government did not make it any the less an order of the Governor-in-Council, in view of the provisions of the Government of India Act; (4) the Chairman was personally liable in respect of the surcharge certificate ; and (5) inasmuch as the Madras District Municipalities Act had provided specific remedies against such orders, a *writ* of *certiorari* will not lie as under the Public Health Act of England.

A. Krishnaswami Aiyar for Petitioner.

The Government Pleader for Respondent.

T. S. V.

Ramesam, J.
28th April, 1925. } *S. A. No.* 1171 *of* 1922.

Inam—Enfranchisement—Karnavan service—Lands in possession of stranger—Adverse possession—Calculation of—Enfranchisement effect of.

Karnam service inam lands were enfranchised in 1905 and patta granted to the karnam but the lands were actually in the possession of a stranger who claimed title by adverse possession. In a suit for recovery of the lands within 12 years of enfranchisement the plaintiff contended that the enfranchisement gave him a fresh title to sue and unless the rights of the Government to resume were barred at that time under Art. 149, Limitation Act, the grantee could recover. Ramesam, J. was inclined to hold that the possession being adverse the ordinary 12 years' rule alone would apply to the suit irrespective of any considerations based on Art. 149 but as this view was opposed to the view of Wallace, J. in 46 M. L. J. 482 referred the case to a Bench.

Y. Suryanarayana for Appellant.

B. Jagannatha Doss for Respondents.

T. S. V.

Odgers, J.
28th April, 1925. } *C. M. P. No.* 2797 *of* 1924.

Civil Procedure Code, O. 22, *R.* 10—*Interest—Meaning of—Decree against legal representative of debtor—Alienation pending revision—Death of alienor—Alienee if can be impleaded.*

Pending revision against the decree in a suit for money against the legal representative of a deceased debtor, the legal representative alienated all the properties he obtained from the original debtor and died. The alienee applied to be impleaded as respondent under O. 1, R. 10 and O. 22, R. 10. *Held,* he could not come on the record as the "interest" contemplated in O. 22, R. 10 was interest in the subject-matter of the suit. Nor could he be held to be a legal representative, being only an alienee from the judgment debtor his life time.

K. V. Sesha Aiyangar for Petitioner.

A. V. Narayanaswami Aiyar for Respondent.

T. S. V.

Krishnan, J.
28th April, 1925. } *C. R. P. No.* 8 *of* 1925.

Civil Procedure Code, S. 95—*Application under—If can be made after decree.*

An application for compensation for arrest on insufficient grounds under S. 95, C. P. Code, can be made after decree in

the suit. Though the defendant when arrested and brought before the Court did not show cause on the application for arrest before judgment, he is not precluded from filing an application under S. 95.

T. S. Anantaraman for Petitioner.

N. Sivaramakrishna Aiyar for Respondent.

T. S. V.

Phillips, J.
28th April, 1925. } *S. A. No.* 1546 *of* 1922.

Madras Estates Land Act—Ryoti land—Classification as wet land in patta—Liability to pay rent—Unfitness for cultivation.

Where lands in a holding are unfit for cultivation, the ryot is not liable to pay rent for such lands though they are classified in the patta as wet land.

B. Sitarama Rao for Appellants.

N. Sivaramakrishna Aiyar for Respondent.

T. S. V.

Phillips, J.
29th April, 1925. } *C. M. A. No.* 413 *of* 1923.

Civil Procedure Code, S. 48—*Decree against one person—In case of failure to recover, execution against other—Death of first person—Execution application more than* 12 *years after decree but within* 12 *years of death—If barred.*

On a difference of opinion between Devadoss and Wallace, JJ. (*See* 48 M. L. J. Notes of Recent Cases, p. 13) a question of law was referred to a third Judge under S. 98, C. P. Code, *i. e.*, where a decree directs execution as against one person and in case of failure to recover from him then against another, when does the period of limitation prescribed by S. 48, C. P. Code, begin to run against the latter ? *Held,* agreeing with the view of Devadoss, J. that the period is 12 years from the date of the decree. 22 C. W. N. 165 (P. C.) ; 40 Mad. 989 ; 40 M. L. J. 1 (P. C.) referred to.

N. Swaminatha Aiyar for *K. V. Krishnaswami Aiyar* for Appellant.

L. S. Veeraraghava Aiyar for Respondent.

T. S. V.

Spencer and Devadoss, JJ. *29th April,* 1925. } *C. M. A. No.* 227 *of* 1922.

Probate and Administration Act, S. 108—*Applicability—Specific legacy—Property in the hands of legal representative—Rights of decree-holder—Attachment of dividends and shares in another District.*

In execution of a decree of a Tanjore Court against the legal representatives of a deceased person, dividends and shares in Coimbatore standing in the name of the deceased were attached. It appeared that these dividends and shares had been given as a specific legacy to one of the legal representatives against whom decree was obtained and that there were other assets in their hands. *Held,* (1) the Tanjore Court had jurisdiction to attach. 39 Cal. 104 distinguished, as applying only to garnishees ; (2) S. 108, Probate and Administration Act, was only directed to executors appointed under the will and had nothing to do with the rights of a decree-holder to execute the decree. *Davies* v. *Nicholson,* 44 E. R. 1158 followed ; observations of Chandavarkar, J. in 29 Bom. 96 that a creditor's action should be treated as an administration action dissented from

A. Ganesa Aiyar and *A. Ramaswami Aiyangar* for Appellant.

S. Varadachariar and *K. S. Champakesa Aiyangar* for Respondent.

T. S. V.

Madhavan Nair, J. 1*st May,* 1925. } *S. A. No.* 646 *of* 1921.

Mortgage—Redemption—Suit for—Payment of money under decree of Court—Sub-mortgagee—Rights of.

In a suit for redemption the sub-mortgagee was not a party. Under the decree of Court, the mortgagor paid the amounts due to the mortgagee. *Held,* this does not prejudice the rights of the sub-mortgagee to proceed against the property. 48 Cal. 1; 43 All. 469 referred to ; 63 I. C. 192 distd.

C. V. Anantakrishna Aiyar and *M. A. T. Coelho* for Appellant.

B. Sitarama Rao and *K. Y. Adiga* for Respondents.

T. S. V.

PRIVY COUNCIL.

28th April.—*Harigir K. Gosavi* v. *Anand B. V. Barthi Gosavi.*
Judgment delivered, dismissing the appeal.

28th April.—*Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick and another.*

Judgment delivered, allowing the appeal.

CORAM : *Lord Sumner, Lord Blanesburgh, Sir John Edge, Mr. Ameer Ali* and *Lord Salvesen.*

I. Petitions for Special Leave to Appeal.

28th April.—*Ratanchand Dyachand and others* v. *Damji Dharsi* (Bombay).

The litigation related to certain temples and land in Bombay which were declared by the Courts there to be public, charitable and religious trusts, and after the High Court had certified the case as a fit one for appeal to the Privy Council, negotiations for settlement appear to have delayed the active prosecution of the appeal, and it was thereupon dismissed under Art. 785 of the High Court Rules.

Sir G. Lowndes, K. C. and *M. R. Jardine* for Petitioners.

E. B. Raikes for Respondents.

Petition dismissed.

28th April.—*Gouri Sankerlal Singha* v. *Ukhara Estate Zemindaries, Ltd. and others* (Bengal)

Application relative to the partition of a joint Hindu family.

Sir G. Lowndes, K. C. and *E. B. Raikes* for Petitioners.
Granted.

28th April.—*A. P. N. Nanakshahi* v. *M. H. M. Abdul Aziz* (Allahabad).

This related to the alleged improper alienation of the property of a Sikh shrine and the High Court had refused leave to appeal on the ground that, though the subject-matter was over Rs. 10,000, and substantial questions of law were involved, the Courts in India had recorded concurrent findings of fact as to

purchase in good faith and with due care from an ostensible owner.

Sir G. Lowndes, K. C. and *E. B. Raikes* for Petitioner.

Dismissed.

28th April.—*Sourendra Nath Mitter* v. *Tambala Dassi* (Bengal).

The Petitioner's suit for partition of joint family property was settled by compromise, which, however, the High Court on appeal set aside, remanding the case for trial. The High Court also rejected the Petitioner's application for leave to appeal on the ground that the order was not "a decree or final order" within the meaning of S. 109 (*a*) of the Civil Procedure Code, 1908, or entitled to a certificate under sub-sect. (*c*) thereof.

L. de Gruyther, K. C., A. M. Dunne, K. C. and *T. W. B. Ramsay* for Petitioner.

Granted.

II. Appeal.

28th & 30th April.—*Sura Lakshmiah Chetty and others* v. *Kothandarama Pillai* (Madras—8 of 1924).

Hearing resumed from 26th January, 1925 (*see* Journal, Vol. XLVIII, p. 31).

L. de Gruyther, K. C. and *E. B. Raikes* for Appellants.

K. V. L. Narasimham for Respondent.

The appeal is proceeding.

A. de M.

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